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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 210

AUBURN SAVINGS BANK,
EASTPORT SAVINGS BANK,
SKOWHEGAN SAVINGS BANK,

Petitioners,

vs.

PORTLAND RAILROAD COMPANY,
CENTRAL MAINE POWER COMPANY,
PORTLAND COACH COMPANY,
CUMBERLAND COUNTY POWER & LIGHT COMPANY,
PUBLIC UTILITIES COMMISSION OF THE STATE OF MAINE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, AUBURN SAVINGS BANK, EASTPORT SAVINGS BANK and SKOWHEGAN SAVINGS BANK, respectfully pray for a writ of certiorari to the Supreme Judicial Court of Maine to review an order entered February 28, 1949 by said Court directing the dismissal of petitioners' bill of complaint herein for lack of jurisdiction over the subject matter for the reason that applicable state law has been supplanted by an overriding Federal statute.

Statement.

Petitioners, three mutual savings banks organized under the laws of Maine, acquired for investment 720 shares of Portland Railroad Company, a street railway (R. 49-51, 71, 75-76). Dividends on the stock were guaranteed at 5% by a utility company, which, as a result of merger is presently known as Central Maine Power Company. This guaranty was contained in a 99 year lease from the Railroad Company to the Power Company and in a legend placed upon the stock certificates of the Railroad Company (R. 1274, 1294).

The Power Company, having acquired and exercised effective stock control of the Railroad Company, proposed a cancellation of the lease and the guaranty, upon payment by it of certain obligations of the Railroad Company and of $110 per share on its stock. The Power Company submitted this proposal to the Securities and Exchange Commission (hereinafter called the "Commission") under Section 11(e) of the Public Utility Holding Company Act (hereinafter called the "Holding Company Act").* The Commission authorized submission of the proposal to the Railroad Company and its stockholders, reserving to the latter the exercise of their rights under the Maine appraisal statute or by other means. The Power Company secured approval of a majority of the stockholders of the Railroad Company and, notwithstanding the objection of petitioners, immediately proceeded to carry out its proposals.

Petitioners promptly instituted proceedings in equity in the courts of Maine against the Railroad Company and the Power Company to obtain an adjudication of their rights, including a setting aside of the transaction as to the stock.

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* 49 Stat. 838; 15 U. S. C. A. §79.

The sitting justice held that the price offered the holders of the guaranteed stock was inequitable, but otherwise denied petitioners' contentions. Upon appeal by petitioners, the Supreme Judicial Court held, among other things, that the state courts lacked jurisdiction to adjudicate rights of petitioners for the reason that the Holding Company Act gave exclusive jurisdiction to the Commission and the latter lacked power to reserve to security holders the exercise of their rights in state tribunals. Review of this decision is sought.

The Original Transaction.

By agreement dated February 15, 1912, the Railroad Company leased all of its property to the predecessor of the Power Company for a term of 99 years (R. 71-A). The lessee agreed, among other things,

> (a) to pay an annual rental equivalent to interest on the debt of the Railroad Company and a 5% guaranteed dividend on the latter's $100 par value stock;
>
> (b) to place a guaranty upon the stock certificates in accordance with the lease (R. 80-A to 88-A).

To facilitate the carrying out of its guaranty, the lease provided that the Power Company might pay dividends direct to stockholders of its lessor, the Railroad Company. Pursuant to the lease provisions, the directors of the Railroad Company adopted a resolution at the outset, requesting that dividends be paid directly to stockholders (R. 83-A). All dividends were so paid through 1944 (R. 43-47).

Operations Under the Lease and Guaranty.

Commencing about 1930 the Power Company gradually abandoned street railway operations and substituted bus transportation, the substitution having been completed by 1941 (R. 448-A, 449-A, 2047, 2095).

Commencing about 1930 and extending through 1940 the Power Company acquired bonds and stock of the Railroad Company, ultimately acquiring 9,795 shares, or 49% of the total outstanding and $1,310,000 principal amount of bonds, or 34.3% of the total outstanding (R. 267-A).

To the extent made after enactment of the Holding Company Act, these acquisitions were authorized by the Commission pursuant to that Act (R. 1721). In its application, the Power Company stated that such acquisitions would not be detrimental to the carrying out of Section 11 of the Act (R. 1689).

A controlling interest in the Power Company was acquired by a holding company about 1930 (R. 26A, 171-A, 1098-1101). All officers and directors of the Railroad Company ultimately were officers or directors of the Power Company or the holding company (R. 201-203, 455-A) and the domination of the Railroad Company by the Power Company was completed.

Recognizing its duty under the lease to provide a purchaser for refunding bonds upon the maturity of outstanding obligations of the Railroad Company (R. 101-A), the Power Company set up reserves on its books, ultimately aggregating $2,285,235, for acquisition or refunding of outstanding bonds (R. 268-A, 322-323). Subsequently, the maintenance of such reserves was required by the Commission as a condition upon the declaration of dividends by the Power Company (R. 1745, 1832). Until the latter part of 1944, the actions of the Power Company were consistent with, and seemingly recognized the existence of, an obligation not terminable by it except upon default of the Railroad Company or a taking by eminent domain (R. 1454-1457; 1463). As the sitting justice found, continued adherence to and compliance with the lease seem to have been contemplated until 1944 (R. 453-A, 454-A, 459-A).

Development of the 1944 Proposals.

During the latter part of 1944, the Power Company, lessee, conceived a scheme for accelerating and liquidating its liabilities under the lease and guaranty.

This scheme, embodied the following (R. 463-A to 465-A):

> (a) Sale of all properties of the Railroad Company;
>
> (b) The Power Company to pay the Railroad Company an amount sufficient to provide for payment of all publicly held bonds and for distribution to all stockholders, other than the Power Company, of $110 per share and to save the stockholders harmless from liability;
>
> (c) The Power Company to surrender for cancellation all of its securities of the Railroad Company;
>
> (d) The lease to be terminated and the Power Company released from all liability thereunder.

The avowed purposes of the scheme were twofold: *first*, to eliminate an expected unprofitable operation after the war and, *second*, to offset substantially all of the costs of the scheme against income taxes at the time of their greatest impact upon the Power Company (R. 156-157, 2000).* In addition, the Power Company would escape two potential liabilities, (a) that of providing for maturities in 1945 and 1951 of $2,335,000 publicly held obligations of the Railroad Company and (b) a claim of the Railroad Company pursuant to the maintenance provisions of the lease for approximately $4,800,000 for property abandoned by the Power Company (R. 197-A, 198-A, 779).

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* The ultimate tax saving was represented to the Commission at a minimum of $3,240,000 (R. 268-A).

Proceedings Before the Commission.

The proposals were adopted by the board of the Power Company on October 27, 1944 (R. 820-821) and on November 10, 1944, they were filed with the Commission as a plan under Section 11(e) of the Holding Company Act. The plan, however, contemplated that these proposals would be submitted as an "offer" to the Railroad Company (R. 470-A).

Prior to that time the Commission had not directed a divestment of operations of the Railroad Company properties (R. 730, 1112-1113). No such proposal had been included in its previous directions served upon the holding company (R. 726).* On the contrary, the Commission had specifically authorized, in 1940, the acquisition by the Power Company of stock of the Railroad Company (R. 1721, 2233, 2241).

At the hearing before the Commission on December 7, 1944, pursuant to notice given November 20, 1944, the security analyst of the Savings Banks Association of Maine, of which petitioners are members, appeared and stated that he regarded the proposed offer of $110 per share as inadequate (R. 278-A, 1008-1010). No other objections were made. The Railroad Company was not a party to, or represented at, the proceedings.

The findings and opinion and "order approving plan" were issued on December 19, 1944, twelve days following the hearing. The Commission found the plan to be "necessary" under Section 11(b)(1) of the Holding Company Act and fair and equitable to the security holders affected. In so doing, it stated that "it is clear that important provisions of the lease are ambiguous" (R. 273-A).

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* The plan of the Power Company's parent holding company, filed October 24, 1944, pursuant to Section 11 of the Holding Company Act, contained no provision dealing with the Railroad Company lease or the guaranty of dividends on its stock (R. 1778).

In its findings and opinion the Commission said (R. 278-A):

> "• • • stockholders dissenting from the proposed plan will have a right, pursuant to Maine statute, to have their stock appraised. Pertinent information concerning such rights will be included with the other solicitation material to be sent to stockholders."

Accordingly, the Commission's report issued pursuant to Section 11(g) of the Holding Company Act to guide the security holders of the Railroad Company in their vote, stated as its conclusion (R. 258-A):

> "The security holders of Portland have the right under Maine laws to have their stock appraised and receive an amount for their stock based on such appraisal. Although this Commission has found the plan fair and equitable, *whether or not any security holder should vote in favor of the plan or choose to exercise his rights under the appraisal statute or by other means should be determined by his independent judgment.* • • • " (Emphasis supplied.)

Consummation of the Scheme.

Following Commission approval, the proposals were embodied in a letter, dated December 20, 1944, from the Power Company, lessee, to the Railroad Company, lessor, as an "offer", "submitted for acceptance within nine days of the date hereof but not thereafter" (R. 204-A, 1993). At a meeting of the stockholders of the Railroad Company held December 28, 1944, the offer of the Power Company was approved by holders of a majority of the shares (including those owned by the Power Company). Petitioners voted against acceptance and filed written objection to the action taken (R. 1503 *et seq.*).

The following day, 22 days after the Commission hearing and 10 days after its report was issued, the scheme

was consummated. The assets of the Railroad Company were transferred, deeds recorded, the mortgages discharged of record and funds irrevocably deposited in trust to cover the payments to security holders of the Railroad Company (R. 1166, 1202). The bonds of the Railroad Company were duly called in accordance with the terms of the contract and, consequently, those of the petitioners holding such bonds accepted payment therefor (R. 1773, 2120-2121).

No application was made to a federal district court for enforcement of the Commission's order (R. 1773).

The Proceedings Below.

Petitioners promptly filed a bill in equity, in the Supreme Judicial Court of Maine, seeking among other things an adjudication of the interests and rights of petitioners.

Chief Justice Sturgis of Maine, the sitting justice, found no "actual intentional fraud" (R. 501-A), but held that "the action of the majority stockholders • • • was unfair and oppressive to the minority stockholders and equity should intervene" (R. 515-A *et seq.*). He concluded that fair treatment required payment of $119.25 per share instead of $110 per share, saying (R. 589-A):

> "There was here more than difference of opinion. There was clear error in computation and unwarranted regard for contingencies that could not arise and to compel the minority stockholders of the Railroad Company to abide by the results is unjust. They do not appear to have a remedy at law. They are entitled to a relief in equity."

In other respects the application of petitioners was denied (R. 622-A).

On appeal by petitioners, the Supreme Judicial Court of Maine concurred with the findings of the sitting justice as

to lack of actual fraud but concluded, on the authority of *Schwabacher* v. *United States*, 334 U. S. 182 (1948), that the Holding Company Act forbade the Commission from reserving to the stockholders their remedies at state law and removed all jurisdiction from the state courts, and consequently that petitioners' bill in equity should be dismissed.

The decision of the court below misconceived the nature of these proceedings. In its preoccupation with the question of the application of the *Schwabacher* case, it brushed aside without examination, not only the many of the contentions of petitioners, but, likewise, the conclusions of the Commission that petitioners were entitled to an independent adjudication of their rights in the state courts, as well as the findings of the sitting justice with respect thereto. For a fuller consideration of the facts and issues here involved this Court is respectfully referred to the opinion of the sitting justice, set forth at pages 432-A to 525-A of the Record, as modified at page 585-A.

Jurisdiction to Review.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code [62 Stat. 869, 929], the respondents having claimed an immunity from the jurisdiction of the courts of Maine under the Public Utility Holding Company Act of 1935 [49 Stat. 838; 15 U. S. C. A. sec. 79] and under authority exercised by the Securities and Exchange Commission. This claimed immunity was upheld by the Supreme Judicial Court of Maine by order dated February 28, 1949 (R. 2257, 2281).

The principal respondents claimed such immunity in their opening statement to the sitting justice (R. 1049-9, 1049-10). Petitioners controverted the claim (i) by objecting to the introduction in evidence of the report of the Commission on the ground that nothing contained in the

report bound the Maine courts (R. 250-251) and (ii) in their brief before the sitting justice.

The sitting justice denied respondents' contention and construed the report of the Commission as having left open for state court determination all questions as to the fairness of the treatment accorded the dissenting security holders, thus denying respondents' contentions (R. 505-A-506-A).

On appeal all questions raised in the trial court were open, under Maine procedure (R. 2267). Before the court below, the principal respondents contended in their brief that in view of the interstate commerce clauses of the Constitution and the provisions of the Holding Company Act, the state courts could not assume jurisdiction.

The court below held (R. 2276-77):

> "* * * in view of the case of *Schwabacher* v. *United States*, heretofore referred to, we think it was beyond the power of the SEC to delegate to the state court any of its authority which, if exercised, might be inconsistent with action which might be taken by the Commission in approving the plan which had been submitted in accordance with the federal statute. We feel that this restriction certainly applies to the reservation of a right to pursue any and all remedies in the state court and probably applies to a reservation of the right to seek the remedy provided by the statutes of Maine for an appraisal. In the light of the *Schwabacher* case we must hold that it was beyond the power of the state court to grant the relief which it did in this case. It could enter no decree which would be inconsistent with such action as was taken or might be taken by the Commission in the exercise of the exclusive jurisdiction given to it by the Holding Company Act."

Likewise in their brief before the court below, respondents took exception to four "Rulings of Federal Law" of

the sitting justice, namely, (a) that one issue was whether the action taken was illegal, (b) that another issue was whether the action was unfair and oppressive to the minority, (c) that the Commission's action must be construed as authorizing submission of an offer by reserving to each stockholder the exercise of his rights under the appraisal statute or by other means, and (d) that acceptance by the stockholders was clearly optional, and that dissenters' rights were preserved.

In addition to the statutory Federal questions, issues as to constitutionality were raised by petitioners, as follows:

1. The bill of complaint alleged that unless relief were granted, petitioners would be deprived of their contract rights under the Constitution of the United States (R. 58-A, see also R. 5-A, 26-A). This contention was denied by the decision of the court below, though no specific reference was made to it.

2. Petitioners' request for separate findings of law under Revised Statutes of Maine (1944), Chapter 95, Section 26, included a requested finding that the action taken violated the rights of petitioners contrary to the Fifth Amendment of the Constitution (R. 359-A). Separate findings were not made by the sitting justice, but his decision in effect denied petitioners' request.

3. Petitioners' interlocutory motion for rulings of law requested a ruling to the effect that any statute impairing petitioners' contract rights would be in violation of the Constitution of the United States (R. 541-A). This motion was denied (R. 583-A).

4. Constitutional questions were raised before the court below by petitioners' assignment of error Nos. 5 and 43,

contained in their brief before that court pursuant to Maine practice, as follows:

"ASSIGNMENT OF ERROR NUMBER FIVE

"• • • the contracts of lease and guaranty • • • created vested contract rights or property rights and remedies, none of which could be thereafter impaired or destroyed by any legislative act, State or Federal (not an exercise of the police power which is not an issue in this case) within the constitutional protection of the contract rights and remedies."

"ASSIGNMENT OF ERROR NUMBER FORTY-THREE

"We charge that to take any of the vested rights under this guaranteed stock from these plaintiffs would be a direct violation and repudiation of their constitutional rights—both State and Federal—in that it would impair their existing contract and property rights or their remedies incidental thereto."

Rulings on assignments of error need not be specifically given under Maine procedure, but the decision of the court below denied petitioners' contentions in whole.

Opinion Below.

The opinion of the court below (R. 2257) is reported in *Auburn Savings Bank* v. *Portland Railroad Company*, ... Me. ....., 65 Atl. (2d) 17 (1949).

Questions Presented.

1. Is a state court deprived of all jurisdiction to determine questions of state law solely because the Commission, pursuant to Section 11(e) of the Holding Company Act, approves a so-called "plan" for divestment of securities

and cancellation of a lease and an obligation of guaranty by a utility company subsidiary of a registered utility holding company, where the purported plan is merely an offer and where the report of the Commission expressly reserves to each security holder the right to determine for himself whether to accept the offer or to exercise his rights under state law?

2. Is the decision of the court below correct in holding that the Commission lacks power, under Section 11(e) of the Holding Company Act, to reserve to each affected security holder the right to determine for himself whether to accept the plan offered or to secure a determination of his rights under state law?

3. Does Section 11(e) of the Holding Company Act grant power to the Commission to determine all questions of state law, so as to deprive state tribunals of jurisdiction over questions of state law, and if so, does the Act violate the Tenth Amendment to the Constitution in that respect?

4. Does Section 11(e) of the Holding Company Act purport to make a determination of the Commission thereunder final and binding on all affected security holders, in the absence of an approval of such determination, as being fair and equitable, by a court of competent jurisdiction, and if so, does the Act violate the Fifth Amendment of the Constitution in that respect?

5. Even if the Commission is given complete and exclusive jurisdiction generally as to Section 11(e) proceedings, does this include jurisdiction to permit a utility company to relieve itself of obligations validly assumed and to alter or impair creditors' rights or to terminate existing leases?

6. Even if the Commission has complete and exclusive jurisdiction, and is lacking in power under the Holding

Company Act to remit security holders to enforcement of their rights in other tribunals, would not this matter in that event have to be remanded for further consideration by the Commission so that it may give proper consideration to rights arising under state laws as an element of fair and equitable treatment?

Reasons Relied on for the Allowance of the Writ.

1. This case presents important questions of Federal Law which have not been, but should be, determined by this Court.

A.

The court below held that state courts were deprived of jurisdiction of questions of state law solely for the reason that the Commission had rendered a decision and report under Section 11 of the Holding Company Act, even though the Commission's report expressly reserved to affected security holders the right of pursuing their state law remedies. In so doing it relied upon the decision of this Court in *Schwabacher* v. *United States* (334 U. S. 199) decided May 3, 1948. In this respect, it is submitted that the court below misconstrued the *Schwabacher* case, which is distinguishable from the instant case in at least three major respects:

(a) In the *Schwabacher* case this Court gave great weight to the provision of Section 5 of the Interstate Commerce Act, which expressly relieves the parties from "the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal". No corresponding provision is contained in the Holding Company Act.

(b) Section 21 of the Holding Company Act, unlike Section 5 of the Interstate Commerce Act, expressly recog-

nizes that the Commission is not to have exclusive jurisdiction where the jurisdiction of others raises no conflict. It provides:

> "* * * nor shall anything in this chapter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder."

(c) Section 25 of the Holding Company Act, unlike Section 5 of the Interstate Commerce Act, also expressly recognizes the concurrent jurisdiction of state courts in suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, the Act by providing:

> "* * * The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this chapter or the rules, regulations, or orders thereunder, and *concurrently with State and Territorial courts,* of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or the rules, regulations, or orders thereunder. * * *" (Emphasis supplied.)

It is submitted, from the foregoing, that the decision in the *Schwabacher* case does not control, and that the court below has mistakenly applied that decision to circumstances where, because of the dissimilarity of the statutes in question, it is not applicable.

The decision of the state court below raises an important question in the area of the delicate interrelations of

state and federal authority. Extension of the principle of the *Schwabacher* case to other fields and to other federal statutes, so as to deprive state courts of jurisdiction, raises issues of such substantial importance as to require determination by this Court.

B.

The court below held that it was "beyond the power" of the Commission to do what it purported to do in this case, namely to provide in a plan for the exercise, by affected security holders, of their rights under state law. In so doing, the court below construed the Holding Company Act, not only as a limitation upon the jurisdiction of state courts, but also as a limitation upon the power of the Commission.

Such a power has heretofore been exercised by the Commission in other cases, where it has offered security holders the alternative of treatment in accordance with applicable local law as determined by local tribunals. See for example: *In re Massachusetts Lighting Companies*, 3 S. E. C. 16, 17 (1938); *In re Commonwealth Gas & Electric Companies*, 3 S. E. C. 13, 14 (1938); *In re Central Massachusetts Light & Power Co.*, 3 S. E. C. 10, 11 (1938); *In re East Tennessee Light & Power Co.*, 6 S. E. C. 985, 990 (1940); *In re Virginia Electric & Power Co.*, 15 S. E. C. 903, 906, 939 (1944); *In re Indiana Hydro-Electric Power Co.*, 15 S. E. C. 941, 955 (1944).

This aspect of the decision below raises an important question of the interpretation of the Holding Company Act as to the power of the Commission thereunder that has not heretofore been, but should be, determined by this Court.

C.

Both the Commission and the court below treated the proceedings before the Commission as one pursuant to Section 11(e) of the Holding Company Act. However, the so-called "plan" approved by the Commission, by its express terms was designated an "offer", and was expressly made subject to acceptance by the Railroad Company within the limited period of nine days. The offer was so limited because of the avowed purpose of the scheme to offset its costs against tax savings within the tax year 1944. While the Commission approved the proposal as "necessary" under the Act, it made no provision for the contingency that the offer might be rejected or might fail of acceptance within the time limited therefor. Nor did the Commission distinguish its views from those of June 1940, when it had expressly authorized the Power Company to acquire the stock of the Railroad Company.

Consequently there is presented the question of interpretation of Section 11(e) of the Holding Company Act as to whether the approval by the Commission of a conditional offer is a plan within the meaning of that Section. This question has not been, but should be, determined by this Court.

D.

The so-called "plan" approved by the Commission has not been made the subject of approval in proceedings instituted in a United States district court by the Commission, in accordance with the provisions of Section 11(e) of the Holding Company Act, nor has it been found to be fair and equitable by any court.

Petitioners instituted the proceedings below to obtain an adjudication of questions of state law, a procedure contemplated by the Commission's report. Certain plaintiffs below, other than petitioners, instituted proceedings in the

Court of Appeals for the First Circuit to obtain a review of the Commission's action but withdrew the appeal (R. 2-4, 540).

As a result of the decision below, petitioners are deprived of the opportunity of an adjudication in the state courts. Petitioners cannot themselves institute a proceeding in the district court and review by the Court of Appeals is not available for the reason that they are not aggrieved parties under Section 24 (a) of the Holding Company Act. See also: *Blatchley* v. *Securities and Exchange Commission*, 157 F. (2d) 898 (C. C. A. 1st, 1946); *Goldfine* v. *Securities and Exchange Commission*, 157 F. (2d) 899 (C. C. A. 1st, 1946); *Okin* v. *Securities and Exchange Commission*, 143 F. (2) 960 (C. C. A. 2nd, 1944).

The result of the decision below is to deprive petitioners of all opportunity for any judicial review or determination of their rights. The question is therefore presented as to whether, under these circumstances, the plan is binding on objecting security holders under the terms of the Holding Company Act, and, if that Act purports to make it so binding, whether the Act is constitutional in that respect. This question has not heretofore been, but should be, decided by this Court.

Nothing contained in the opinion in *Securities and Exchange Commission* v. *Central-Illinois Securities Corporation*, decided by this Court on June 27, 1949, is determinative of this question, or of any other question raised in this petition.

E.

The sitting justice concluded that the holders of stock of the Railroad Company did not have a guaranty running to them, separate and apart, from the lease, relying upon the provision of the lease that "the termination of this lease

for any cause except the default of the Power Company shall operate to terminate and cancel any and all guaranteed dividends" (R. 89-A). The erroneous determination of the court below that the Holding Company Act prevented it from applying state law deprived petitioners of a final ruling on this question.

The ruling of the sitting justice was clearly in error, for the following reasons:

(a) The lease contemplated its termination only for three reasons (i) default by the Power Company, (ii) default by the Railroad Company or (iii) a taking by eminent domain of the portion of the properties yielding at least one-third of the gross earnings (Article XVIII) (R. 114-A). Consequently, it is clear that the lease intended to provide for termination of the guaranty only upon default by the Railroad Company or upon a taking by eminent domain.

(b) This conclusion is reinforced by the specific provisions of the lease which contain a clear expression of intent to assume an obligation to pay the guaranteed dividends to the stockholders. Article I provides (R. 84-A, 92-A, 107-A):

> "But the Power Company does not hereby assume any obligation to pay any part of said rental to any holders of such bonds or other obligations, excepting only the holders of stock of the Railroad Company."

This provision expressly negatives any guaranty by the Power Company of the principal of bonds or notes or any obligation to the bondholders to pay interest, while making a clear distinction as to its obligations to pay directly to the holders of the stock (R. 84-A, 92-A, 107-A). The existence of the obligation of guaranty was clearly contemplated in the vote of the stockholders of the Power Company authoring the directors to make the guaranty (R. 31).

The guaranty thus established between the Power Company and the stockholders of the Railroad Company the relationship of debtor and creditor.

A similar conclusion was reached by the Commission, which stated (R. 276-A):

> "In our opinion the claim of a Portland stockholder, based on Central Maine's guarantee, is analogous, although slightly inferior, to that of a long-term unsecured creditor."

This raises the question of whether or not, under Section 11(e) of the Holding Company Act, the Commission's findings and conclusions with respect to the treatment of creditors, as distinguished from stockholders, is final and conclusive in the absence of a decision by any court of competent jurisdiction, determining that the proposed treatment is fair and equitable. This question has not heretofore been, but should be, determined by this Court.

F.

The Commission approved the so-called plan purporting to eliminate the Power Company's obligation of guaranty, and thus construed Section 11(e) of the Holding Company Act as permitting the divestment of an obligation, as well as an asset.

A contrary construction of the Act is indicated by *In re Laclede Gas Light Company*, 57 F. S. 997 (D. C. Mo., 1944) aff'd *sub. nom. Massachusetts Mutual Life Ins. Co.* v. *Securities and Exchange Commission*, 151 F. (2) 424 (C. C. A. 8th, 1945) cert. den. 327 U. S. 795, in which the district court said (p. 1005):

> "We do not believe that the Act should be construed to provide, and we do not so hold, that because

Laclede Gas is under legal compulsion to submit a plan that Laclede Gas could voluntarily use a situation as an opportunity to divest itself of legal obligations."

This raises a question, corollary to that referred to in E above, of whether or not Section 11(e) of the Holding Company Act authorizes any action the result of which would permit a utility company to relieve itself of an obligation validly assumed. This question has not heretofore been, but should be, determined by this Court.

G.

The so-called plan approved by the Commission embodied an offer to be made by the Power Company to the Railroad Company for termination of the lease. The Power Company voted its 49% stock interest of the Railroad, together with proxies for other stock solicited by it, in favor of acceptance and caused the board of directors of the Railroad Company to approve, over the objections of petitioners.

Unlike the various portions of the Bankruptcy Act, such as Section 77 [11 U. S. C. A. §205], which specifically authorize the rejection of leases, the Holding Company Act contains no such provision. Even under the explicit grant of authority of Section 77 of the Bankruptcy Act, the power to deal with the lessor is limited, *Callaway* v. *Benton*, 93 L. ed. (adv. op.) 443, decided February 7, 1949.

In view of the domination of the Railroad Company by the Power Company and its ownership of 49% of the Railroad Company's stock, the effect of the Commission's approval of the offer was to authorize the Power Company to reject the lease, despite the absence of specific authority therefor in the Holding Company Act. This

raises the question of whether or not the Commission has such authority, a question that has not heretofore been, but should be, determined by this Court.

2. The decision of the court below is in conflict with decisions of this Court.

A.

In refusing to apply principles of law properly applicable and to follow the Commission's report insofar as it left security holders to their proper remedies, the decision of the court below is in conflict with the decision of this Court in *Callaway* v. *Benton*, 93 L. ed. (adv. op.) 443, decided February 7, 1949.

In that case, arising under Section 77 of the Bankruptcy Act, the plan of reorganization provided for acquisition on specified terms of certain properties leased from South Western or, if not so acquired, for rejection of the lease. The district court held that the question of whether a Georgia railroad (South Western) could convey all of its properties without unanimous consent of its stockholders was one for the bankruptcy court applying federal law and that conveyance could be made on consent of holders of a majority of the shares. This Court reversed and held (at p. 447):

> "We do not agree. The language of the plan and the factors which the Commission took into consideration in arriving at the amount offered South Western for its properties indicate clearly that, so far as the reorganization plan contemplates acquisition of the lessor railroad, the ordinary rules of offer and acceptance were intended to apply. That has invariably been the practice."

After pointing out that this did not derogate from decisions upholding the power of the Commission, this Court said (at p. 449):

> "There is therefore no occasion to override state law. The plan implicitly accepts it as controlling. The fact that the law may make acceptance of the offer less likely than would be the case if the offeree were incorporated elsewhere does not change the picture. We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded."

In the *Callaway* case this Court required that proper effect be given to a plan provision contemplating that action be taken in accordance with applicable state law.

In direct conflict with this decision, the ruling of the court below refuses to give effect to the report of the Commission expressly providing that stockholders should be free to exercise their rights under the appraisal statute or by other means. This conflict should be resolved by this Court.

B.

It is submitted that the decision of the court below, in refusing to adjudicate the rights of petitioners, is in conflict with the decision of this Court in *Central New England R. Co.* v. *Boston & A. R. Co.*, 279 U. S. 415 (1929).* In that case, Central New England had received from the Interstate Commerce Commission authority to discontinue operations over the line of Boston & Albany, conducted pursuant to an operating agreement. Operations were discontinued and Boston & Albany sued for the payments due under the operating agreement and received payment. In affirming, this Court concluded,

---

* Recently affirmed as to principle in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946).

contrary to the contentions of Central New England, that the grant of authority to abandon operations did not relieve the carrier of its contractual obligation to pay rent and that the state court had jurisdiction to entertain the action. In refusing to pass upon the argument that the Interstate Commerce Commission had no power to grant relief from the obligation, this Court said (at p. 418):

> "* * * It suffices, for the present purposes, that the certificate and the accompanying report of the Commission did not purport to exercise such a power. * * *"

In the *Central New England* case, this Court held that since the Commission, as a result of silence in its report, did not assume jurisdiction the contract rights were properly subject to adjudication in state courts and the obligor was not relieved of his obligations.

In the instant case, the report of the Commission is even more explicit and expressly contemplates the enforcement of remedies in a state tribunal. Consequently, the decision of the court below, refusing to adjudicate such rights, is in conflict with the decision of this Court in the *Central New England* case.

C.

As already set forth (*supra*, p. 14), the court below mistakenly relied upon the opinion of this Court in *Schwabacher* v. *United States* (334 U. S. 182) in concluding that the state courts had no jurisdiction. However, even if the principle of the *Schwabacher* case were generally applicable here, the action of the court below in dismissing petitioners' bill of complaint nevertheless is in direct conflict with the action taken by this Court in that case.

In the *Schwabacher* case this Court held, under the particular provisions of Section 5 of the Interstate Commerce

Act, that no rights granted to dissenting stockholders by state law concerning liquidation survived a merger agreement approved by the requisite number of stockholders and approved by the Interstate Commerce Commission as just and reasonable. This Court went on further to hold (334 U. S. 182, 201):

> "• • • Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable. In making that determination, those rights are to be considered to the extent that they may affect intrinsic or market values. While the Commission has found that what the appellants are given in this plan is just and reasonable, the record indicates that it may have declined to consider these claims, even if they are found to have some effect on the intrinsic value of the stock, because it thought it lacked jurisdiction. Under these circumstances, we cannot be sure that in arriving at its conclusion that the plan was just and reasonable it did not exclude some factors that it should consider under the views set out in this opinion. We therefore reverse the judgment below and remand the case to the Commission for reconsideration under the principles herein expressed."

Applying these principles, it is evident that the decision of the court below conflicts with the *Schwabacher* case.

The Commission, in its report to the security holders, in the instant case, concluded as follows (R. 259-A):

> "• • • Although this Commission has found the plan fair and equitable, whether or not any security holder should vote in favor of the plan or choose to exercise his rights under the appraisal statute or by other means should be determined by his independent judgment.• • •"

Here, as in the *Schwabacher* case, it is evident that there can be no certainty that in arriving at its conclusions the Commission took into account the rights of the security holders under the state laws. Indeed, since the Commission here expressly pointed out to the security holders that they might exercise their rights by other means, it must be assumed that the Commission's conclusions contemplated the availability of such remedies to the security holders. Even if the decision below were ultimately sustained, in so far as it concluded that there was complete lack of jurisdiction in the state courts and lack of Commission power to remit security holders to their state law remedies, this major assumption inherent in the Commission's finding of fair and equitable treatment, would be removed. Consequently, in accordance with the decision in the *Schwabacher* case, the matter should, in that event, be remanded to the Commission for reconsideration.

The decision of the court below directing that the bill in equity be dismissed, is in direct conflict with the decision of this Court in the *Schwabacher* case and should, therefore, be reviewed by this Court in order that that conflict may be appropriately resolved.

Moreover, under the circumstances by which acceptance of the offer was obtained, a question is raised as to compliance with the standards announced by this Court in *Taylor* v. *Standard Gas & Electric Company*, 306 U. S. 307 (1939).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Judicial Court of the State of Maine, commanding that court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all pro-

ceedings in said court in this case to the end that this cause may be reviewed and determined by this Court and that the order of said Supreme Judicial Court of Maine be reversed and that your petitioners be granted such other and further relief as may appear proper.

Dated, July 26, 1949.

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[Appendix Follows]

Appendix.

Public Utility Holding Company Act of 1935 (49 Stat. 838; 15 U. S. C. A. §79).

SECTION 11 (15 U. S. C. A. §79k)

Simplification of Holding Company Systems—Examination By Commission with View to Simplification.

(a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

Limitations on operations of holding company systems.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, how-*

ever, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

* * * * * *

Submission by company of plan for simplification; court enforcement of order of approval; appointment of trustee.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at

any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this chapter, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

• • • • • •

SECTION 21 (15 U. S. C. A. §79u).

Effect on Other Laws.

Nothing in this chapter shall affect (1) the jurisdiction of the Commission under sections 77a to 77mm or sections 78a to 78jj of this title over any person, security, or contract, or (2) the rights, obligations, duties, or liabilities of any person under such sections; nor shall anything in this chap-

ter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder.

* * * * * *

SECTION 25 (15 U. S. C. A. §79y).

Jurisdiction of Offenses and Suits.

The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this chapter or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28, and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, §17-101). No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against the Commission in any court.

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In The Supreme Court of The United States

OCTOBER TERM, 1949

No. 210

AUBURN SAVINGS BANK,
EASTPORT SAVINGS BANK,
SKOWHEGAN SAVINGS BANK,
Petitioners

v.

PORTLAND RAILROAD COMPANY,
CENTRAL MAINE POWER COMPANY,
PORTLAND COACH COMPANY,
CUMBERLAND COUNTY POWER & LIGHT COMPANY,
PUBLIC UTILITIES COMMISSION OF THE STATE OF MAINE,
Respondents

BRIEF FOR PORTLAND RAILROAD COMPANY, CENTRAL MAINE POWER COMPANY AND CUMBERLAND COUNTY POWER & LIGHT COMPANY, RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The Supreme Court of The United States

OCTOBER TERM, 1949

No. 210

AUBURN SAVINGS BANK,
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PORTLAND COACH COMPANY,
CUMBERLAND COUNTY POWER & LIGHT COMPANY,
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BRIEF FOR PORTLAND RAILROAD COMPANY, CENTRAL MAINE POWER COMPANY AND CUMBERLAND COUNTY POWER & LIGHT COMPANY, RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Maine Supreme Court below (R. 2257) is reported in *Auburn Savings Bank, et al. vs. Portland Railroad, et al.,* .... Me. ...., 65 Atl. (2d) 17 (1949). The Finding of the Sitting Justice of the Maine Court who heard the case appears in the Record. (R. 432A-R. 525A), modified in part (R. 585A-R591A).

JURISDICTION

Petitioners invoke the jurisdiction of this Court under Section 1257(3) of Title 28 of the United States Code (62 Stat. 869, 929) on the basis of Respondents having claimed an immunity under the Public Utility Holding Company Act of 1935 (49 Stat. 838; 15 U.S.C.A. Sec. 79) and under authority of an order of the Securities and Exchange Commission.

Respondents respectfully submit that the jurisdiction of this Court so invoked by this Petition for Writ of Certiorari should be refused in accordance with Rule 38 of the Rules of this Court.

ISSUE

An electric utility, a subsidiary of a registered holding company, filed with the Securities and Exchange Commission a plan under 11(e) of the Holding Company Act for the divestment of its interest in its non-utility subsidiary. After notice and hearing, in which the Petitioners for certiorari (stockholders of the non-utility) took part, the Commission found the Plan "necessary" under 11(b)(1), that the payments provided by the Plan to all persons interested, including specifically the stockholders of the non-utility, were "fair and equitable" and entered an Order approving the Plan. The Petitioners not seeking review under 24(a) or a stay under 24(b), the Plan was consummated in accordance with the Order of the Commission. Thereafter the Petitioners, without exercising the rights under the Maine Appraisal Statute reserved by the Plan, brought a bill in equity in a State Court against the electric utility, its non-utility subsidiary and the purchaser of the non-utility's assets seeking to set aside such consummation. This bill was dismissed by the State Court of last resort on the ground that the State Court could take no action inconsistent with the action taken by the Commis-

sion in the exercise of the exclusive jurisdiction given to it by the Holding Company Act.

Should this Court review on certiorari the decision of the State Court because (a) the State Court has decided a Federal question of substance not heretofore determined by this Court, or (b) because the decision of the State Court is probably not in accord with applicable decisions of this Court?

STATEMENT OF CASE

This case was instituted by bill in equity filed in the Maine Court by Petitioners, stockholders of Portland Railroad Company (hereinafter called the "Railroad Company") seeking to set aside, as illegal, unfair and fraudulent, action authorized by the stockholders of that company at a special meeting held December 28, 1944. (R. 62A-67A) At that meeting it was voted that the Railroad Company sell its physical assets to Central Maine Power Company (hereinafter called "Central Maine") and Portland Coach Company, cancel the Lease of its property, dated as of February 1, 1912, to Cumberland County Power & Light Company (hereinafter called "Cumberland"), under which Lease Central Maine was successor Lessee by merger, pay all of its debts, other than such of its bonds as were held by Central Maine which were to be surrendered, and a liquidating dividend of $110 per share to its stockholders, other than Central Maine, and thereafter dissolve. (R. 1503-1523, R. 458)

Central Maine, an electric utility, and the Railroad Company, owner of a bus system (its direct subsidiary), were both subsidiaries of New England Public Service Company, a "holding company" which was registered as such under the Public Utility Holding Company Act of 1935 (hereinafter called the "Holding Company Act" or the "Act"). (R. 261A, R. 250) All of the foregoing transactions so authorized by vote had been embodied in a Plan filed by

Central Maine under 11(e) of the Act with the Securities and Exchange Commission (hereinafter called the "Commission"). (R. 188A, R. 255) Such Plan was approved by Order of the Commission (R. 285A, R. 250) and found necessary to effectuate the provisions of 11(b)(1) and *"fair and equitable to the persons affected thereby"*. (R. 260A, R. 250)

In accordance with the Plan, no application was made to a Federal District Court for an enforcement order under 11(e) of the Act. Although they were granted the right to be heard and participated in the hearing before the Commission (R. 261A), Petitioners advised the Commission they did not wish to file a brief, sought no review under 24(a) of the Act, and therefore no stay under 24(b), made no attempt to exercise the right to an appraisal provided in the Plan, but elected to wait until the Plan had been consummated and then brought this proceeding in the Maine Court to set aside the entire transaction.

Under the Lease (R. 71A, R. 13), executed in 1912, for a term of ninety-nine years, the Lessee was to pay as rental such amounts as might be necessary to pay interest on the Railroad Company bonds and annual dividends of 5% on its stock. (R. 80A-87A) These payments were to be made to the Railroad Company, although, *at the option of the Lessee,* dividends could be paid directly to stockholders. (R. 83A) Dividends were guaranteed by Central Maine subject to their declaration by the Railroad Company and to the further provision that payment of that part of the rental represented by dividends to the Railroad Company, instead of the stockholders directly, satisfied the guaranty. (R. 89A)

The statement contained on Page 4 of the Petition that setting up reserves "for acquisition or refunding of outstanding bonds" constituted a recognition of a duty to stockholders of the Railroad Company to provide a purchaser for refunding bonds is obviously incorrect. If the

reserves were utilized to *acquire the bonds,* Central Maine under the terms of the Lease could offset future rental payments against the interest and principal of overdue bonds so acquired. (R. 105A-106A)

As of September 30, 1944 the balance sheet of the Railroad Company showed outstanding bonds of $3,645,000 against bondable property of only $1,560,704. (R. 515A, 516A) Of these outstanding bonds, $2,045,000 principal amount would become due November 1, 1945 and the balance on July 1, 1951. (R. 516A) The inability of the Railroad Company to meet either maturity was apparent, as well as the foreclosures of the trust mortgages and breach of the Lease by the Lessor, which would result from such defaults by it; also the likelihood that the Directors of the Railroad Company would no longer permit dividends to be paid its stockholders but retain that portion of the rental to meet imminent bond maturities.

The word "scheme" is used on page 5 and repeatedly in the Petition with the obvious innuendo that something tricky or underhanded was intended. Petitioners apparently ignore the fact that the Plan had to be submitted to the Commission and to all security owners of the Railroad Company and a public hearing held; further that after such submission and hearing the Plan was considered in detail by the Commission and found "necessary" and "fair and equitable". As the divestment of its interest in the Railroad Company required by 11(b)(1) would necessarily impose a large loss, Central Maine desired to effect such divestment and take such loss, which sooner or later was inevitable, during 1944 when its taxable income was large and the estimated effect of such loss upon its tax was substantial.

The Sitting Justice found no intentional fraud, and held the various transactions legal. (R. 501A) However, unlike the Commission, he assumed that there were no substantial legal complications to the payment of 5% dividends for the next sixty-six years, and ordered Central Maine to

pay Petitioners $119.25 per share, its actuarial value as computed by him. (R. 591A) His reasoning was that, although there was no intentional fraud, the price of $110 per share was unfair and oppressive, and he was therefore empowered to set aside the transactions embodied in the Plan. (R. 589A, 590A) Since he felt that to set aside the consummated transactions was impractical and might prove most inequitable (R. 591A), he ordered payment of $119.25 per share for the 730 shares owned by Petitioners and Intervenors (R. 2264) as a money substitute for the equitable relief he ruled he was empowered to accord. Practically all other publicly held shares had accepted the $110. (R. 590A)

Petitioners appealed to the Maine Supreme Judicial Court, sitting as the State's highest court. That Court upheld the ruling of the Sitting Justice as to the absence of fraud, and confirmed, expressly or by implication, all of his rulings on matters of State law, including those relating to interpretation of the Lease and guaranty, but held in the light of *Schwabacher* v. *United States*, 334 U. S. 182, 92 L. Ed. 1305 (1948) (decided after the Sitting Justice rendered his decision) (R. 2277):

> "• • • it was beyond the power of the state court to grant the relief which it did in this case. It could enter no decree which would be inconsistent with such action as was taken or might be taken by the Commission in the exercise of the exclusive jurisdiction given to it by the Holding Company Act."

It therefore not only dismissed the Petitioners' appeal but, as under Maine practice all questions presented by the Record were before it, dismissed the bill itself.

Additional facts are contained in the opinion of Justice Thaxter of the Maine Supreme Judicial Court, and reference is made to that opinion for a full and accurate statement of all material facts.

INTRODUCTION TO ARGUMENT

We are unable to improve upon the reasoning or selection of authorities in the opinion of Justice Thaxter, speaking

for the Supreme Judicial Court of Maine, sitting as the Court of last resort for that State. The extract above quoted aptly and succinctly states the question decided. The cogency of the reasoning by which the opinion supports that decision is self-evident. We shall, therefore, confine our brief primarily to the limited issue of whether a federal question of substance is presented.

The failure of the Maine appellate court to mention specifically the ruling of the Sitting Justice that the Petitioners did not have a guaranty separate and apart from the Lease is not ground for certiorari. The construction of the Lease and the guaranty, and the effect upon the guaranty of termination of the Lease, were matters of Maine law. Not only was the guaranty "subject to" the Lease, but the Sitting Justice ruled that termination of the Lease terminated the guaranty. We would assume the Maine Court's reason for not commenting upon this ruling was that it was so obviously correct comment was unnecessary.

The grounds urged in the Petition, (Sections 1 C and D p. 17, E p. 18, F p. 20, G p. 21) are not open on Petition for Certiorari.[1]

None of the contentions set out in the foregoing sections of the Petition were raised, litigated or passed upon by the Commission, the Sitting Justice, or the Maine Court on appeal. In *McCullough* v. *Kammerer Corporation,* 323 U. S. 327 (1945) this Court granted certiorari on a ground which was not properly raised, litigated or passed upon below. This was not apparent to this Court when certiorari was granted but became so when the case was argued. This Court dismissed the writ saying:

> "Thus the only question for which we granted certiorari is one not properly raised, litigated or passed

[1]Offer not a Plan, Petitioners deprived of judicial review, treatment of creditors not valid without Court review, authority of Commission to permit for present consideration termination of future obligation and cancellation of Lease by mutual consent.

upon below . . . (citing cases) The grounds asserted for the allowance of certiorari are inadequately supported by the record, and the writ is therefore dismissed."

It needs no citation of authorities that if a ground not properly raised, litigated or passed upon below cannot be considered by this Court in its appellate jurisdiction, such ground cannot be made the basis for bringing a case to this Court.

See also the cases cited in the McCullough case to the general effect that issues not properly raised, litigated or passed upon below cannot be considered by this Court.

THE MAINE COURT HAS NOT DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT

A

The Federal Question decided by the Maine Court is not distinguishable from that decided by this Court in Schwabacher v. United States (334 U. S. 182, 1948).

On pages 14 and 15 of the Petition for Certiorari it is asserted that in at least three respects the Schwabacher case is distinguishable from that at bar.

(a) and (b). The end result sought to be accomplished by Section 5 of the Interstate Commerce Act was that existing railroad corporations should by merger be made larger and thereby a more effective and economical transportation system be provided. On the other hand, the end result sought to be accomplished by Section 11(b)(1) of the Holding Company Act was that the operation of each holding company system should be limited "to a single integrated public-utility system and to such other businesses as are reasonably incidental or economically necessary or appro-

priate to the operations of such integrated public-utility system." It is, therefore, not surprising that Section 5 of the Interstate Commerce Act should expressly exempt all mergers approved by that commission from all State or Federal anti-trust and anti-monopoly Statutes. Such an exemption would be clearly out of place in Section 11(b)(1) of the Holding Company Act.

As to the exclusive jurisdiction of each Commission over matters within its province, no valid distinction can be drawn between the two statutes. Section 21 of the Holding Company Act is explicit in providing that the jurisdiction of states and their officers and agencies shall continue only "*insofar as such jurisdiction does not conflict with any provision of this title or any rule, regulation or order thereunder.*"

The decree of the Sitting Justice was based on his ruling that a Maine Court in equity could enjoin the carrying out of a Plan approved by order of the Commission. Clearly the relief sought by the Petitioners and the jurisdiction so asserted by the Sitting Justice do *conflict* with the *provisions* of the Holding Company Act and the *order* of the Commission thereunder. As Justice Thaxter said, after considering the verbal differences between the two Acts, it is "apparent from the underlying purposes of both statutes that it was the intent that jurisdiction of the respective commissions within a certain ambit should be exclusive." (R. 2277) As this Court pointed out in the Schwabacher case and again in *Securities and Exchange Commission* v. *Central-Illinois Securities Corporation et al* (the Engineers case), decided June 27, 1949, 93 L. Ed. (adv. op.) 1291, the Interstate Commerce Act and the Holding Company Act are of "very similar purposes".

(c). Section 25 of the Holding Company Act clearly grants to state courts the power, concurrently with federal courts, to enforce liabilities or duties created by the Holding Company Act and to enjoin violations of that Act and rules, regulations or orders issued thereunder. As expressed

in that Section, the function of the state courts is to *assist in carrying into effect* the Holding Company Act and orders of the Commission. If the Petitioners' contention be correct, the function of State Courts is not to assist in carrying into effect orders of the Commission *but rather to nullify such orders* by setting aside consummated transactions carried out in exact compliance therewith.

In fact, the Holding Company Act confers broader powers upon the Securities and Exchange Commission to dispense with stockholder action than does the Interstate Commerce Act upon the Interstate Commerce Commission or Chapter X of the Bankruptcy Act upon District Courts of the United States.

The dissenting opinion of Justice Frankfurter in the Schwabacher case, concurred in by the Chief Justice and Justice Burton, affords no support to the contention of the Petitioners. It does not indicate that the Court of Michigan had or *could be given* by the Interstate Commerce Commission any power to enjoin the consummation of a merger it had approved. The reasoning of that opinion may approve the right of appraisal under the Maine statute provided by the Plan, which the Petitioners declined to utilize; but nowhere does it intimate that the Michigan court could enjoin consummation of the merger approved by the Interstate Commerce Commission or the Maine court enjoin consummation of a plan approved by the Securities and Exchange Commission.

Under Maine law a Sitting Justice in Equity could decree a money payment to the Petitioners if, and only if, he could enjoin the consummation of the Plan or, after its consummation, set aside all action pursuant thereto.

This is entirely clear not only from the opinion of Justice Thaxter but from the findings and opinion of Justice Sturgis, the Sitting Justice before whom the case was tried.

The cases, dealing with Maine corporations, upon which he relied, *MacArthur* v. *Port of Havana Docks Co.*, 247 Fed. 984 (D. C. Me. (1917)); *May* v. *Midwest Refining Co.*, 25 F.S. 560 (D. C., Me. (1938)) and *May* v. *Midwest Refining Co.*, 121 F. (2d) 431, C.C.A. 1 (1941) are clearly based on that principle of Equity procedure, which he adopted and followed. The opinion of Justice Thaxter repeatedly refers to the "relief sought" by the Petitioners —to set aside all corporate votes and action pursuant to the Plan—and the lack of power in the Maine court to grant such relief.

Justice Sturgis, having found that the value of the Petitioners' stock, as determined by the Commission, was so far below what he deemed fair as to be unfair and oppressive, *first ruled that he had the power to set aside and annul the consummated plan.* If he had not so ruled, he would have been forced to dismiss the bill. Having ruled he had that power, in his discretion he chose not to set aside the transactions but to decree a money payment as an alternative and substitute relief, stating:

> "A court of equity is not bound to set aside a voidable transaction in order to give proper relief to one who has suffered thereby when equitable relief may be worked out more efficiently by allowing the transaction to stand upon condition that equitable compensation be made. *Sabre* v. *United Traction & Electric Co.*, 156 Fed. 79, 83. See *May* v. *Midwest Refining Co.*, 121 Fed. 2d 431." (R. 591A)

The so-called Appraisal or Minority Stockholders Provisions of the Maine Statutes are Sections 80 to 91, inclusive, of Chap. 49, Revised Statutes of Maine, 1944, inserted in part in the Appendix. Save as to procedure, they differ only slightly from those of other States, and give minority stockholders no right to prevent or set aside a sale of corporate assets.

No one has ever suggested that there is any principle of Maine Equity procedure whereby an Equity Court may substitute itself for the machinery provided by the appraisal statute. The fundamental equitable principle that equity jurisdiction attaches only when there is no adequate legal remedy precludes any such result.

Justice Sturgis ruled adversely to the Petitioners on every question of law and fact except one, viz: that $110 a share was inadequate, and on that ground alone he based his decision that equity could interpose. He found inequitable that which the Commission had determined to be "fair and equitable". He substituted his judgment for that of the Commission on a matter which as this Court stated in the Engineers' case comes within that "area of expert discretion" which the Holding Company Act expressly entrusted to the Commission.

The issue in the Maine Courts was clear. They had power to grant neither (1) the relief sought by the Petitioners nor (2) that given by Justice Sturgis' decree, *unless they had power to enter a decree entirely inconsistent with the action taken by the Commission; viz, to enjoin or set aside that which the Commission had approved.*

B

The intent and effect of the phrase "or by other means", in the 11(g) report of the Commission does not give rise to a federal question of substance.

The Commission issued in accordance with its usual practice, two separate documents, viz.: an Order and a Findings and Opinion. The Order is the only document issued by the Commission compelling or permitting, as the case may be, action by any person or corporation subject to the Commission's jurisdiction. The Findings and Opinion are an integral part of the procedure under the Act because if such Findings are "supported by substantial evidence", they are controlling upon all Federal Courts.

The "Order Approving Plan" (R. 285A) is silent either as to right of appraisal or delegation to the State Court. In the "Findings and Opinion" of the Commission (R. 260A) is found this sentence:

> "In addition it may be noted that any stockholders dissenting from the proposed plan will have a right, pursuant to Maine statute, to have their stock appraised." (R. 278A)

Nowhere in the Findings and Opinion is there any reference to any other right of the stockholders to question the order of the Commission. The third document issued by the Commission, its Report pursuant to 11(g), contains the following:

> "Although this Commission has found the plan fair and equitable, whether or not any security holder should vote in favor of the plan or choose to exercise his rights under the appraisal statute *or by other means* should be determined by his independent judgment." (R. 259A) (Emphasis supplied)

The phrase "or by other means" contained in that sentence is the only ground upon which the Petitioners contend that the Commission had adopted any such unusual procedure as to delegate to the State Court the power to find that the Commission's valuation was so inadequate that the State Court might nullify the entire proceedings before the Commission.

We may, once and for all, comment upon the Petitioners' repeated contention that the Commission reserved to stockholders of the Railroad Company all "their rights under state laws". If the Commission reserved anything to the stockholders, it was, in the Commission's own language used in the Report, "to exercise his rights under the appraisal statute *or by other means*" (emphasis supplied). There is no intimation anywhere in the Report and none in the Order and Findings and Opinion which

could possibly be construed to intimate what "other means" the stockholders might exercise, or that they had any rights under Maine law other than to an appraisal.

It is clear that the State Court seriously doubted whether the Commission *intended to or did so delegate.* Note the language of Justice Thaxter (R. 2276):

> "How far did the Commission intend to go, how far did it go, and how far did it have the power to go in remitting minority stockholders to their remedies in the state court?"

Respondents respectfully submit that the Commission neither intended to or did make any such remission. We further submit, as bearing upon the relatively narrow issue raised by this Petition, that, leaving aside for the moment the power of the Commission, the answer to the questions of what it intended and whether such intent was effectively exercised must depend upon the phraseology used in the 11(g) Report *in this case.* If that be true, *it must follow that no federal question of substance is presented. There can be no reason to suppose that the same or equivalent phraseology has been or will be used in any other case.*

We respectfully contend that even if the Commission had power to permit the Petitioners to exercise any rights in addition to those under the appraisal statute, *such delegation of power was not accomplished by the insertion of these four words in the Report.*

The Report, as the Court well knows, is not subject to appeal or question. Neither the Central Maine nor the stockholders of the Railroad Company had any right to question whatever the Commission might see fit to insert in the Report. No Court had any authority to review it. It was merely advice which the Act obligated the Commission to give those from whom proxies were solicited.

No more do we believe it conceivable that the Commission, after consideration of a matter of this consequence, after preparation of a detailed Findings and Opinion, meant by

the insertion of this vague phrase in the Report to accomplish such an unusual result. In no respect do the Order or the Findings and Opinion lack clarity. There is no occasion to resort to another document in order to determine the intent of the Commission.

Nor can it be argued that the words in the Report are meaningless unless we ascribe to them the effect given by the Petitioners. Its purpose was to advise stockholders, many of them unfamiliar with corporate procedure and the Holding Company Act. One right which they certainly had and to which "or by other means" might well be intended to refer was to seek review under 24(a), another to petition the Commission for reconsideration of its decision.

The language of Judge Learned Hand in *Public Service Commission* v. *Securities and Exchange Commission,* 166 F. (2d) 784, 787, C.C.A. 2, (1948) cert. denied 334 U. S. 838, although dealing with the question of statutory construction, is illuminative:

> "Whether the Commission or the company begins is only a matter of procedure; the outcome will be precisely the same, for in either case the end sought is measured by subsection (b), an end whose realization the Act affirmatively prescribes. This once understood, it becomes to the highest degree unlikely that Congress should have set up a system of dual control over the fulfillment of this purpose; for it is scarcely necessary to expatiate upon the obvious defect of so organizing any official control; we have already declared ourselves on the matter in *Phillips* v. *Securities and Exchange Commission.* Indeed, in *First Iowa Hydro Electric Cooperative* v. *Federal Power Commission,* the Supreme Court carried this consideration in disregard of the text of a statute to much greater lengths than is necessary here. We start therefore with the premise that only the most explicit and unescapable language will suffice to bring about a result which so impedes, and is likely altogether to thwart, an expressly declared object of the Act."

If, as Judge Hand says, it is "to the highest degree unlikely that Congress should have set up a system of dual control", it is even more unlikely that the Commission to which he found control was committed should itself deliberately abdicate exclusive control and re-establish dual control. If it did intend so to do, such result "likely altogether to thwart, an expressly declared object of the Act" would be expressed in *"the most explicit and unescapable language."*

No administrative practice by the Commission to delegate power to State Courts to set aside transactions consummated pursuant to Commission order.

On page 16 of the Petition, it is contended that the Commission has heretofore exercised the power asserted by the Petitioners, viz.: to delegate to a state court power to set aside transactions which have been authorized by order of the Commission. In support of that contention the Petitioners cite a number of cases decided by the Commission, beginning with *In re Massachusetts Lighting Companies,* 3 S.E.C. 16, 17 (1938).

While some of the cases cited have authorized the value of securities to be determined by appraisal under a state statute and some by arbitration, in no one of them is there even an intimation that the Commission could empower a state court *to prohibit by injunction or otherwise in its entirety the consummation of a plan approved by the Commission.*

If the question here were whether the reservation by the Plan of the right of appraisal under the Maine statute was valid, the foregoing releases might be pertinent; they do not however support the much broader contention of these Petitioners.

The Court will note that the date of the latest Securities and Exchange Commission release referred to by Petitioners is 1944, that of the Commission's order in this case.

The Findings and Opinion of the Commission in the Kings County Lighting Company matter (Holding Company Act Release 7060, *dated December 14, 1946*) are pertinent in this connection. The Plan approved in that Release, amended as therein suggested, is that enforced in *Public Service Commission* v. *Securities and Exchange Commission, supra.* In the 11(e) plan first presented to the Commission in that matter was a provision that it be approved in accordance with the laws of New York by affirmative vote of two-thirds of the Common and two-thirds of the Preferred, each voting as a class, dissenters to have the right of appraisal. If the required approvals were not obtained, the Company reserved the right to ask the Commission to apply to a court under 11(e) for enforcement. The Commission said:

> "Thus, the failure to secure the required approval of the preferred stockholders would prevent the consummation of a plan which this Commission has found, if the suggested modifications are made, to be necessary to effectuate the provisions of Section 11(b) of the Act and fair and equitable. This would defeat the very purpose for which the Act was enacted. *Phillips* v. *S. E. C. et al.,* 153 F. (2d) 27 (1946), cert. den. 328 U. S. 860.
>
> "Even if the required vote is obtained, a shareholder who is not in favor of the proposed changes has the right, pursuant to the applicable New York law, to have the value of his stock appraised and to receive, in cash, the amount awarded. The aggregate amount of such demands cannot of course be estimated now. At any rate, it appears that two different standards of the equitable equivalent of the rights and interests of the stockholders would result—the first being the various participations found by us to be fair and equitable and the other being the cash appraisal value found to be proper by the appraisers. Further, if the holders of a large number of shares demand their appraisal rights, the cash funds which the company might be required to pay might be such as to impair its cash working capital and, thus, the feasibility of the amended plan.

> "In view of these circumstances, we shall not approve the amended plan unless the provision for a vote of shareholders is eliminated, enforcement of the plan in an appropriate court is requested, and the plan is to become effective and consummated pursuant to the order of said court."

We are informed that the precedent of the Kings County Lighting case has since been followed by the Commission, and it is now its settled practice not to approve plans containing a right of appraisal in accordance with state statutes. *At no time did the Commission authorize State Courts to enjoin the carrying out of plans it had approved; still less to set aside all action pursuant thereto.*

C

Whether any proposed method of divestment of a non-utility subsidiary constitutes a "Plan" under Section 11(e) is a matter within the expert judgment of the Commission, subject to review under Section 24(a).

Petitioners question whether the Plan approved by the Commission really was entitled to that designation. This question was not raised below. There is no statutory definition of what constitutes a "Plan". Here was a detailed proposal which provided a means of accomplishing a fundamental purpose of the Act. The Commission found it a "Plan" and that it was "necessary" and afforded "fair and equitable treatment to the persons affected".

We submit that under any sound principle of administrative law, it was the Commission's function to determine whether or not any method devised for accomplishing one of the objects of the Act constituted a "Plan". *In re North Continent Utilities Corporation,* 54 F.S. 527 D.C. Del. (1944).

The Petitioners claim that it was not a "Plan" under 11(e) because it contemplated the making of an "offer".

The plan approved in *Phillips* v. *Securities and Exchange Commission,* 153 F. (2d) 27, C.C.A. 2 (1946), cert. denied 328 U. S. 860 likewise embodied an offer. If for any reason the Plan in the case at bar were not carried out within the time prescribed, it in no way limited the power of the Commission subsequently to compel divestment under 11(b)(1) or thereafter to approve any new 11(e) plan for such divestment. It has been repeatedly held by the Commission and Federal courts that for the Commission to find a plan "necessary" under the Act it need not find that plan to be the only plan or the best plan.

D

Petitioners not deprived of judicial review.

Petitioners urge that as the Plan did not contemplate enforcement proceedings under 11(e), they have been deprived, by the decision of the Maine Court, of all right of judicial review. This question was not raised below. In *Phillips* v. *Securities and Exchange Commission, supra,* the Circuit Court of Appeals held that 11(e), relating to District Court enforcement of voluntary plans, was "very clearly permissive", that it would not interpret the Act so as to produce unneeded enforcement proceedings, and that stockholders' rights were adequately protected by their right to a review under 24(a).

This Court, in *American Power & Light Company* v. *Securities and Exchange Commission,* 325 U. S. 385 (1945), held that stockholders adversely affected by Commission orders relating to companies in which they own stock were persons aggrieved and entitled to a review under 24(a), though not technically parties. These Petitioners were clearly so entitled.

The cases on which they rely are not in point. *Blatchley* v. *Securities and Exchange Commission,* 157 F. (2d) 898, C.C.A. 1 (1946) and *Goldfine* v. *Securities and Exchange*

Commission, 157 F. (2d) 899, C.C.A. 1 (1946) were companion cases in which 24(a) petitions were dismissed on the authority of *Okin* v. *Securities and Exchange Commission,* 145 F. (2d) 206, C.C.A. 2 (1944) and *Lownsbury* v. *Securities and Exchange Commission,* 151 F. (2d) 217, C.C.A. 3 (1945). The order in the Blatchley and Goldfine cases appears in the opinion in another companion case, *Petition of Blatchley,* 157 F. (2d) 894, C.C.A. 1 (1946), and provided "that this order shall not become operative to authorize the consummation of the plan until an appropriate District Court shall have entered an order enforcing the plan."

The decisions in *Okin* v. *Securities and Exchange Commission,* and *Lownsbury* v. *Securities and Exchange Commission,* both *supra,* arose on orders similar to that in the Blatchley and Goldfine cases, and held that petitions to review such orders did not lie, on the familiar procedural ground that interlocutory orders are not subject to review. The case of *Okin* v. *Securities and Exchange Commission,* 143 F. (2d) 960, C.C.A. 2 (1944), on which Petitioners also rely, related to a purely procedural matter and the petition for review was dismissed on the same ground.

In the case at bar the Order of the Commission was not subject to any such condition, but was final and unconditional. Nothing remained to be done by either Commission or District Court.

Not only were Petitioners represented before the Commission, but the person who represented them, on his own behalf as a stockholder of the Railroad Company, filed a petition for review under 24(a). Subsequently that petition for review was dismissed on his own motion. (R. 4)

This Court in *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41 (1938), dealing with provisions of the National Labor Relations Act providing for review of orders of the National Labor Relations Board which are

similar to those in Section 24(a) of the Holding Company Act, said:

> "Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals."

E AND F

The approval by the Commission of the Plan for termination of the Lease and guaranty by mutual consent is in accord with the authority consistently exercised by the Commission under Section 11 and uniformly approved by the Federal Courts.

Petitioners' contentions to the contrary were not raised in the Maine Court.

By the Lease Central Maine could satisfy the guaranty by making payments direct to the Railroad Company. (R. 89A-90A) At its option it could pay direct to stockholders of the Railroad Company, (R. 83A) but, if it paid the Railroad Company, was under no further obligation to the stockholders. (R. 89A-90A) The Petitioners were thus not in any sense creditors of Central Maine, but stockholders of its subsidiary which was a creditor.

Even if a debtor-creditor relationship did exist, we fail to see how that raises any federal question of substance. The Phillips case *supra* holds a Commission approved plan may become final without issuance of a District Court enforcement order. As this Court said in *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624 (1945) at p. 638:

> "Where pre-existing *contract provisions* exist which produce results at variance with the legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate."

In both *New York Trust Company, et als.* v. *Securities and Exchange Commission,* 131 F. (2d) 274, C.C.A. 2

(1942) and *Massachusetts Mutual Life Insurance Company* v. *Securities and Exchange Commission,* 151 F. (2d) 424, C.C.A. 8 (1945), the authority of the Commission under Section 11 to approve the retirement of bonds without payment of premium has been upheld. In the first case, no request was made to a District Court for an enforcement order. It was even held *In re Standard Gas & Electric Co.,* 151 F. (2d) 326, C.C.A. 3 (1945) that the jurisdiction of the Commission includes the power to approve a distribution in kind to debenture holders. In each case certiorari was denied by this Court.

The Court in *In re Standard Gas & Electric Co., supra,* held the principles announced by this Court in the Otis & Co. case were applicable to Section 11 proceedings, whether the plan dealt with treatment of stockholders or creditors, saying:

> "Consequently a general grant of power to reorganize which has been held applicable to one group of security holders, as here, by the Otis decision, must be held applicable to the other. If Congress had meant otherwise, the distinction between debenture holder and shareholder could all too easily have been made. The fact that Congress neither drew the line of demarcation nor even discussed it in the hearings or reports indicates how little weight a separatist argument can be given now."

In each case contract provisions are not permitted to produce results at variance with the Act and the issue is the "equitable equivalent" of the securities to be surrendered.

The Commission has repeatedly held that an interest in a bus transportation business is not retainable under the standards of 11(b)(1). If Central Maine was to continue for sixty-six years as lessee of the Railroad Company's buses it would necessarily continue to have an interest in the transportation business. Assume Central Maine should divest itself of all securities of the Railroad Company; the objectives of 11(b)(1) would in no way be

accomplished if it still continued as lessee of the Railroad Company's property. It would still be in the bus transportation business, a business not reasonably incidental to the operation of a public utility system.

The only way for Central Maine to divest itself of its interest in this transportation system was to secure a cancellation of the Lease. Certainly no solvent corporation would have accepted an assignment of it. Notwithstanding the suggestion of Petitioners' counsel, the Commission of its own motion under 11(b)(1) could have ordered cancellation of the Lease upon fair and equitable terms. Sooner or later such action had to be taken. The order of the Commission approving this Plan for termination by mutual consent is as effective and entitled to as much weight as an order of the Commission entered on its own initiative.

G

Lease not rejected but terminated by mutual consent pursuant to Maine Law

Under G. (p. 21 of the Petition) the contention is made that the Commission could not authorize Central Maine to "reject" the Lease. This Lease was not rejected by unilateral act of Central Maine. It was terminated by *mutual consent* pursuant to stockholders' vote at a meeting held legal by both the Sitting Justice and the Maine Court on appeal. Thus the Lease and all rights thereunder were terminated in accordance with Maine law and no federal question is presented.

THE DECISION OF THE MAINE COURT IS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT

A

The decision of the Maine Court is in accord, not only with that of this Court in the Schwabacher case, but also

with prior decisions of this and other Federal courts upholding the supremacy of the commerce power and the exclusive control vested in the Commission by the Holding Company Act. *American Power & Light Co.* v. *Securities and Exchange Commission,* 329 U. S. 90 (1946); *North American Co.* v. *Securities and Exchange Commission,* 327 U. S. 686 (1946); *Phillips* v. *Securities and Exchange Commission,* supra; *Public Service Commission, et al.* v. *Securities and Exchange Commission,* supra. It is also in accord with decisions of this Court holding that state courts have no jurisdiction to entertain suits which constitute collateral attacks on orders of federal administrative bodies. *Bowles* v. *Willingham,* 321 U. S. 503 (1944); *Venner* v. *Michigan Central R.R.,* 271 U. S. 127 (1926). See also *Seaboard Air Line Railroad Company* v. *Daniel,* 333 U. S. 118 (1948).

The distinction between the decision of the Maine Court in the case at bar and that of this Court in *Callaway* v. *Benton,* 93 L. Ed. (adv. op.) 443 decided February 7, 1949 is plain. In the Callaway case, which arose under Section 77 of the Bankruptcy Act, the lessor was offered the opportunity of selling its property to the Lessee or of having the lessee disaffirm the lease. Since the lessor was *not subject to the jurisdiction of the bankruptcy court,* whether or no the lessor should sell its railroad was, as this Court held, a matter for determination by its stockholders under state law.

In the case at bar both Lessor and Lessee were subsidiaries of a registered holding company and *both* subject to the jurisdiction of the Commission. Moreover, as pointed out in the Callaway case, that decision in no way derogated from recent decisions, including the Schwabacher case, which had upheld the power of the Interstate Commerce Commission to over-ride state laws. The basis of the decision was that Section 77 of the Bankruptcy Act did not give the right, to Commission or Court, to require accept-

ance *by a Lessor not in reorganization* of an offer for the purchase of its property.

B

No more is the decision of the Maine Court in conflict with the decision of this Court in *Central New England R. Co.* v. *Boston & A. R. Co.*, 279 U. S. 415 (1929). The Plaintiff railroad had leased trackage rights to the Defendant. The Defendant procured an order from the Interstate Commerce Commission authorizing it to discontinue service over its connecting line. It was a typical petition for discontinuance; the Commission in no way passed, or attempted to pass, upon the question of what compensation, if any, the Plaintiff should thereafter receive. The Plaintiff prevailed in an action at law to collect rent. This Court, after declining to hear the counsel for the Plaintiff (respondents in this Court) held that, whether or no the Interstate Commerce Commission had power to relieve a carrier of its contractual obligations with respect to the abandoned trackage rights, it did not purport to exercise such power, and affirmed the verdict for the Plaintiff.

In our case the Commission *did determine* the compensation which should be awarded for discontinuance of the rental payments. It capitalized the rent payable over the remainder of the Lease and made a very slight deduction therefrom because of certain legal difficulties, which, in its judgment might stand in the way of future dividends. The Petitioners thus were afforded the "equitable equivalent" of their rights, as found by the Commission. In the case relied on by Petitioners there was no decision in the discontinuance proceedings as to the future liabilities, if any, of the lessee; but the lessee contended that the mere fact, that by order of the Interstate Commerce Commission, it was freed from the obligation to serve the public on a connecting line, freed it from all future liability to pay rent under a valid and existing agreement.

C

Petitioners suggest that the decision of the Maine Court is not in accord with the Schwabacher case because in that case the proceeding was remanded to the Interstate Commerce Commission, while in the instant case Petitioners' bill in equity was dismissed by the Maine Court on the ground that it could not grant the relief sought. We cannot believe that Petitioners' counsel seriously feel that distinction is valid. The Schwabacher case went on direct appeal from an order of the Interstate Commerce Commission to a special three-judge Federal Court, and from that Court directly to this Court. The proceedings in the Schwabacher case were taken strictly in accordance with the statutory method of review provided by the Interstate Commerce Act, and this Court having reached its decision had the power to remand.

In the instant case no review was sought by Petitioners under the direct method provided by the Holding Company Act. Instead, Petitioners instituted proceedings in the Maine Court to set aside transactions embodied in a plan approved by the Commission. In essence the Petitioners' proceeding is a collateral attack on the order of the Commission. The Courts of Maine have no control over the Commission. Any order issued by the Maine Court remanding this matter to the Commission would be a mere nullity.

The assertion on page 26 of the Petition that "there can be no certainty that in arriving at its conclusion the Commission took into account the rights of the security holders under State law" is contradicted many times by the language of the Findings. The Commission considered at length the possible differing constructions of the Lease and their affect upon the rights of the Lessee and the stockholders of the Lessor, and the consequences which might ensue when on November 1, 1945 the Second Mortgage Bonds and on July 1, 1951 the First Mortgage Bonds

became due. After considering the financial situation of the Lessor, and the possible "ambiguities" under the Lease, the Commission found the plan a "compromise" between the different constructions "adverse to Central Maine" and therefore favorable to the Petitioners, and specifically found "the settlement proposed by the Plan to be fair and equitable to the persons affected thereby". (R. 273A) The Court in *In Re North American Light & Power Co.*, 170 F. (2d) 924 C.C.A. 3 (1948) held that it was within the Commission's authority to approve the settlement of corporate claims without considering the merits of individual claims provided it used reasonable judgment in determining the expediency of the entire settlement.

REASONS PECULIAR TO THE CASE AT BAR WHY THIS COURT SHOULD NOT EXERCISE ITS DISCRETION IN BEHALF OF THE PETITIONERS.

We note that the reasons in Rule 38, par. 5, do not fully measure or control the Court's discretion, and that the writ "will be granted only where there are special and important reasons therefor". In the case at bar, we submit, there are no such reasons; on the contrary there are reasons *peculiar to this case against granting the writ.*

These Petitioners were represented at the hearing before the Commission by a trained security analyst, who stated (R. 1033) that Petitioners felt the price of $110 per share inadequate; and (R. 1034) "We (the Petitioners) make no objection so far as treatment of the bonds is concerned. We do make objection in regard to the treatment of the stock."

(1) Although the Trial Examiner of the Commission suggested that the Petitioners file a brief they declined so to do. (2) After the Order of the Commission was issued, they did not petition for review under 24(a). (3) Although they voted in the negative at the stockholders' meeting, they did not follow up such vote by requesting an appraisal

under the Maine statute, which right was expressly reserved to them by the Plan. These three apt remedies they ignored.

The attitude of the Petitioners is summarized in Justice Thaxter's opinion. (R. 2264):

> "What these stockholders apparently want as we gather it from their bill is not reimbursement, not to be made whole under any of the provisions of law either state or federal, but rather by appealing to the broad equity powers of the state court to assume control over these corporations, and particularly to enforce the provisions of the lease of Railroad Co. exactly in accordance with its terms. They take pains to disclaim any purpose to avail themselves of their statutory rights."

Surely the Petitioners, whose motives are thus so aptly characterized and who have neglected the ample opportunities afforded them by both Act and Plan to procure a review or reversal of the Commission's adjudication of the value of their stock, the only issue they raised before the Commission, are wandering far afield when they petition a busy court to exercise its discretion in their behalf.

CONCLUSION

In conclusion, we wish briefly to comment on the absurd results which would follow if the contention of these Petitioners was sustained. This Court has now made clear in the Engineers' case that the scope of review of an order of the Commission is the same whether considered by a District Court under 11(e) and thereafter on appeal to a Circuit Court of Appeals, or whether submitted directly to a Circuit Court of Appeals under 24(a). In each instance either Court, and even this Court, is bound by the findings of the Commission as to value, if based on sound legal principles and supported by substantial evidence.

The contention of the Petitioners amounts to this, viz.: that (1) a single justice of a State Court, whose findings of

fact in turn are not subject to correction by the State Court of last resort if similarly supported, can be empowered to exercise a power as to a plan approved by the Commission which, *under applicable decisions of this Court, cannot be exercised by any Federal Court;* (2) a single Justice of a State Court can examine, de novo, into "equitable equivalents", matters which this Court has held to be within the "area of expert discretion" of the Commission; and (3) if he disagrees with the Commission, he can nullify all it had decided. If these contentions were sound, the Commission could not effectively administer and carry out the objectives of the Act. Hopeless confusion between state and federal courts would result.

Assume, after a plan had been approved by the Commission, stockholder A files a petition to review under 24(a) in a Federal Court of Appeals, stockholder B a bill in equity seeking to enjoin or set aside in a State Court. The Federal Court approves the Plan. The State Court enjoins its consummation. Which view prevails? Is the result different if the petition to the Federal Court comes before or after the bringing of the bill in equity? Is the result different if the decision of the Federal Court of Appeals is announced before or after the decision of the State Court? The mere possibility of any such chaotic condition illustrates the wisdom of the framers of the Constitution in providing that in all matters within the federal power as to which Congress has acted, the federal and not the state authority shall control. That being so, the decision of the Maine Court must be correct and in its own language (R. 2277):

> "It could enter no decree which would be inconsistent with such action as was taken or might be taken by the Commission in the exercise of the exclusive jurisdiction given to it by the Holding Company Act."

Respondents, Central Maine Power Company, Cumberland County Power & Light Company and Portland Railroad Company submit that:

1. The Maine Supreme Court has not decided a Federal question of substance not theretofore determined by this Court;

2. The decision of the Maine Supreme Court is in accord with applicable decisions of this Court; and

3. There are special reasons *peculiar to this case* why *these Petitioners* are not entitled to have this Court exercise its discretion in their favor.

WHEREFORE, the undersigned Respondents pray this Honorable Court that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935
(49 Stat. 838; 15 USCA 79)

"SEC. 11 (b). It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system:

* * * * * * * *

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

* * * * * * * *

SEC. 11 (e). In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find

such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * * * * *

SEC. 11 (g). It shall be unlawful for any person to solicit or permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, consent, authorization, power of attorney, deposit, or dissent in respect of any reorganization plan of a registered holding company or any subsidiary company thereof under this section, or otherwise, or in respect of any plan under this section for the divestment of control, securities, or other assets, or for the dissolution of any registered holding company or any subsidiary company thereof, unless—

* * * * * * * *

(2) each such solicitation is accompanied or preceded by a copy of a report on the plan which shall be made by the Commission after an opportunity for a hearing on the plan and other plans submitted to it, or by an abstract of such report made or approved by the Commission;

SEC. 21. Nothing in this title shall affect (1) the jurisdiction of the Commission under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934 over any person, security, or contract, or (2) the rights, obligations, duties, or liabilities of any person under such Acts; nor shall anything in this title affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this title or any rule, regulation, or order thereunder.

SEC. 24 (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evi-

dence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

SEC. 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240

of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled 'An Act to establish a court of appeals for the District of Columbia', approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court".

MAINE APPRAISAL STATUTE

Chap. 49, Revised Statutes of Maine, 1944, Sections 80-91

RIGHTS OF MINORITY STOCKHOLDERS

SEC. 80. *Corporation not to sell franchises or entire property without consent of stockholders. R.S. c.* 56, § 63. 1931, *c.* 225, § 5. 1937, *c.* 195.

I. No corporation shall sell, lease, consolidate, or in any manner part with its franchises, or its entire property, or any of its property, corporate rights, or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, except with the consent of its stockholders at an annual or special meeting, the call for which shall give notice of the proposed sale, lease, or consolidation. All such sales, leases, and consolidations, except as in this section hereinafter otherwise provided, shall be subject to the provisions of this and the 11 following sections, and to the prior lien of stockholders as therein defined. Except as to franchises, this and the 11 following sections shall not be held to apply to mortgages of corporate property.

* * * * * * * *

SEC. 81. *Remedy of dissenting stockholder. R.S. c.* 56, § 64. If any stockholder in any corporation which shall vote to sell, lease, consolidate, or in any manner part with its franchises, or its entire property, or any of its property, corporate rights, or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, shall vote in the negative and shall file his

written dissent therefrom with the president, clerk, or treasurer of such corporation within 1 month from the day of such vote, the corporation in which he is a stockholder may, within 1 month after such dissent is so filed, enter a petition with the supreme judicial court, or the superior court, sitting in equity, in the county where it held its last annual meeting, in term time or in vacation, setting forth in substance the material facts of the transaction, the action of the corporation thereon, the names and residences of all dissenting stockholders whose dissents were so filed, making such dissenting stockholders parties thereto, and praying that the value of the shares of such dissenting stockholders may be determined and for other appropriate relief.

SEC. 82. *If corporation fails to enter petition, dissenting stockholder may enter and prosecute the same. R.S. c.* 56, § 65. If any such corporation shall fail to enter such petition as aforesaid, any stockholder dissenting as aforesaid may within 1 month thereafter enter such petition and prosecute the same, making such corporation party defendant. In either case the court shall fix the time of hearing and shall order notice thereof to all parties interested, by publication in some newspaper or newspapers at least 2 weeks successively and such personal service as is required upon bills in equity.

SEC. 83. *Court to determine value of shares and secure rights of stockholders; corporation to deposit amount of award in some bank; shares to become property of corporation. R.S. c.* 56, § 66. The court, or any justice thereof, in term time or in vacation, shall hear the parties and determine as soon as practicable the value of the stock of such dissenting stockholders; and shall make and enforce all such orders and decrees as may be necessary to secure to such stockholders all their rights. Such corporation shall, notwithstanding any appeal as hereinafter authorized, forthwith deposit the amount so awarded in some bank or trust company designated by the court, to be by it held until final judgment and paid to the parties as thereafterwards

ordered by the court directing such deposit. Upon such deposit and upon compliance with final judgment as hereinafter provided, the shares of such stockholders shall become the property of such corporation, and the court may make and enforce such orders as may be necessary to secure its title thereto.

SEC. 84. *Either party may enter appeal, and trial had before a jury; award, how paid; appellant to have lien on property of corporation. R.S. c.* 56, § 67. Within 30 days after filing the decree determining such values as aforesaid, either party may enter an appeal therefrom, to be heard at the next term of the superior court in the county where such petition is pending. The issue may thereupon, at the request of any party thereto, be submitted to a jury. If upon such trial the amount of such award is increased, the stockholder shall have judgment and execution against the petitioning corporation or corporation defending, for such increase with interest and costs; and if decreased, such corporation may withdraw from said deposit the amount of the decrease with interest and costs. During the pendency of such appeal, the appellant shall have a lien upon all the property of the corporation interested in such sale or lease or consolidation for 30 days after judgment on appeal. Such lien shall have precedence over any mortgages or leases made after any vote of sale, lease, or consolidation. All such liens may be released upon filing with the court a bond in such amount and with such sureties as the court may approve. Two or more stockholders may join in the same appeal.

* * * * * * * *

SEC. 87. *If corporation fails to pay amount decreed, rights of stockholders; lien of dissenting stockholder. R.S. c.* 56, § 70. If none of the corporations interested in such petition shall pay or deposit the amount as herein ascertained and decreed, with interest thereon, within such time as the court shall order, any stockholder, entitled to such amount, may at his option take judgment and execution therefor, with in-

terest and costs, against such corporation or withdraw his stock aforesaid; and after such withdrawal or if said execution is returned unsatisfied within 30 days after judgment, the owner of such shares shall retain all the rights of a dissenting stockholder as though no proceedings had taken place. All stockholders entitled to a remedy hereunder shall have a lien upon the property of the corporations in which they are stockholders which shall take precedence of all mortgages or leases of any kind made after any vote of sale, lease, or consolidation. Such liens may be released as provided in section 84.

SEC. 88. *Court may hear and determine petitions, and make orders for enforcement of rights of all parties. R.S. c.* 56, § 71. The supreme judicial court, or the superior court, or any justice thereof may in term time or vacation hear and determine said petitions and make all orders for giving notice to non-resident parties, and taking action with reference to them, for the enforcement of the rights of any party to the proceedings, for the consolidation of two or more petitions, for the payment of interest on the adjudged value of the shares, for the payment of dividends, pending the proceedings, for interest upon the deposit aforesaid, for the distribution of costs between the parties, and for enforcing its orders and decrees, as are consistent with the principles of equity practice, and as the convenient and speedy settlement of the controversy may require.

* * * * * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 210.

AUBURN SAVINGS BANK,
EASTPORT SAVINGS BANK,
SKOWHEGAN SAVINGS BANK,

Petitioners,

vs.

PORTLAND RAILROAD COMPANY,
CENTRAL MAINE POWER COMPANY,
PORTLAND COACH COMPANY,
CUMBERLAND COUNTY POWER & LIGHT COMPANY,
PUBLIC UTILITIES COMMISSION OF THE STATE OF MAINE,

Respondents.

REPLY BRIEF OF PETITIONERS.

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Respondents.

REPLY BRIEF OF PETITIONERS.

I.

The record supports the grounds urged in the petition for granting certiorari.

Respondents assert (brief, p. 7) that certain of the important questions of Federal law set forth in the Petition as requiring the determination of this Court were not raised, litigated or passed upon below.

No effort is made by respondents to support this assertion and it is submitted that it is clearly in error. The

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manner in which the Federal questions were raised below is set forth in detail in the Petition at pages 9 to 12, inclusive. For the further convenience of the Court, there is attached hereto as an appendix the four rulings of Federal law of the sitting justice which were objected to by the respondents in their brief in the court below, in accordance with Maine practice.

Reference to the details of the raising of the issues below, set forth in the petition, and to the appendix, will disclose that the points referred to by the respondents were, in fact, raised as follows:

As to Point C. This was covered by petitioners' objection to the introduction in evidence of the report of the Commission and in the briefs of petitioners in the state courts (Petition, pp. 9 and 10) and by respondents' objections to "Third Questioned Ruling (Federal)" and, again, to "Fourth Questioned Ruling (Federal)" (See appendix hereto).

As to Point D. This was covered generally in the argument in the court below, but could not be dealt with specifically, inasmuch as the question arose out of and as a consequence of the decision of the court below.

As to Points E, F and G. Each of these is covered by petitioners' Assignment of Error No. 5 and Assignment of Error No. 43 (Petition, p. 12) and by respondents' objections to "Third Questioned Ruling (Federal)" and to "Fourth Questioned Ruling (Federal)".

In view of the foregoing, it is submitted that the case of *McCullough* v. *Kammerer Corporation*, 323 U. S. 327, relied upon by respondents, is inapplicable.

II.

The respondents misapprehend the nature of the situation calling for review by this Court.

Respondents seemingly misapprehend the basis of petitioners' application, as well as the purport of the decision below.

For example, respondents emphasize (brief, pp. 4, 27) that petitioners were represented at the Commission hearings and failed to make objections other than as to the price of $110 being inadequate. This argument is beside the point, since as shown in the petition, the Commission recognized that there were various legal uncertainties involved and, presumably for that reason, included a provision expressly contemplating that a stockholder might "exercise his rights under the appraisal statute or by other means." In fact, petitioners were not represented at the hearing. The analyst of the Savings Banks Association of Maine appeared at the hearing, as set forth in the Petition (at p. 6), but was without authority to represent petitioners (R. 1010, 61, 73, 77).

Again, respondents urge, in effect, that the Commission could not have intended that the phrase "by other means" was to have particular significance (brief, p. 12 *et seq.*). This overlooks the fact that the phrase occurs in the Commission's report, which is required to be issued and sent to the security holders for their guidance under Section 11(g) of the Holding Company Act. It may not be presumed that the Commission, created among other things for the protection of investors, would mislead security holders as to their rights by an irresponsible statement in an official report.

Moreover, contrary to the contentions of respondents (brief, pp. 11-12), the Maine courts of equity are not restricted to an application of the appraisal statute. Broader powers are available, as shown, for example, by the very cases referred to by respondents, *May* v. *Midwest Refining Company*, 121 F. (2d) 431 (C. C. A. 1st, 1941); *MacArthur* v. *Port of Havana Docks Co.*, 247 Fed. 984 (D. C. Me., 1917). In the latter case, the court said (at p. 987):

> "The remedy provided for a dissenting minority stockholder by the Maine statute is not exclusive, so that a court in equity is restricted thereby in affording relief by the application of equitable principles, where there has been fraud or oppressive and unfair treatment of the minority in a sale or plan of reorganization proposed by the majority stockholders of a corporation."

Presumably the Commission knew this to be the law of Maine. Consequently, its reference to "other means" cannot be construed to have had no significance.

Respondents also urge that jurisdiction of the state courts necessarily conflicts with the provisions of the Holding Company Act and with the order of the Commission thereunder (brief, p. 9), despite the clear language of the Act and of the Commission's report. If the Commission were right, the jurisdiction of the state court could not conflict, since the Commission's report contemplated such proceedings.

On the other hand, if the Commission were wrong, in any respect whatever, it was the duty of the state court to say so, even though it meant finding the Act unconstitutional. Appropriate provision for review by this Court is available in such cases.

From the foregoing and other related arguments of respondents, it is apparent that the purport of their argument is that the state courts have jurisdiction to agree with the Commission but none to disagree; that when security holders rely upon the invitation of the Commission to ascertain their rights in a state tribunal, they do so at their peril since the state courts can do nothing except approve what the Commission does; and that state courts cannot even fill in the gaps that the Commission leaves to them. If these interpretations of the decision below are correct, it is submitted that they afford further reasons for granting the application of petitioners.

Certain other assertions contained in the brief of respondents are believed to be in error. We believe that these are sufficiently dealt with in the Petition.

Respectfully submitted,

Dated, August 31, 1949.

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[Appendix Follows]

Appendix.

The following is quoted from the brief of the Power Company before the court below with reference to objections to rulings of the sitting justice:

"At this point, for the convenience of the Court, we insert the Rulings of Federal Law with which the Appellee Power Companies seriously disagree, and which they earnestly submit are erroneous.

RULINGS (FEDERAL LAW) WHICH APPELLEES BELIEVE ERRONEOUS

First Questioned Ruling (Federal)

'The controlling issues in this case are whether the acts of the majority stockholders of Portland Railroad Company, and particularly Central Maine Power Company in authorizing the disposition of practically all the assets of the Railroad Company, its liquidation and its dissolution, as also the acts of those who executed that authority, were illegal, and if not, were so unfair or oppressive to the minority stockholders that equitable relief should be granted. These issues will now be considered' (R. p. 501-A).

Second Questioned Ruling (Federal)

'Finding no illegality in the Special Meeting of the Portland Railroad Company of December 28, 1944, now is reached the all-important question as to whether the action of the majority stockholders in their voting to dispose of the assets of the corporation and the disposition thereof made pursuant to such votes was unfair and oppressive to the minority stockholders and Equity should intervene' (R. p. 515-A).

Third Questioned Ruling (Federal)

'The ORDER, the REPORT and the FINDINGS and OPINION of the Securities and Exchange Commission must be read together and, so read, must be construed as authorizing Central Maine to submit the Offer which it had prepared together with the Plan and Portland Railroad Company, that is its stockholders, at their election to accept the same, but reserving to each and all of the stockholders of the Railroad Company the right to refuse to accept said Offer and Plan and as to his stock "exercise his rights under the appraisal statute (Maine) or by other means (to) be determined by his independent judgment".' (R. p. 478-A).

Fourth Questioned Ruling (Federal)

'As I construe the law, this was a directive to Central Maine to present the Plan, with Offer included, which had been approved, to Portland Railroad Company and its stockholders and obedience by Central Maine was mandatory. Not so as to the Railroad Company or its stockholders. With them acceptance of the Offer and Plan was clearly optional and rights of all dissenting stockholders were preserved.' "

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OCTOBER TERM, 1949.

No. 210.

AUBURN SAVINGS BANK,
EASTPORT SAVINGS BANK,
SKOWHEGAN SAVINGS BANK,

Petitioners,

vs.

PORTLAND RAILROAD COMPANY,
CENTRAL MAINE POWER COMPANY,
PORTLAND COACH COMPANY,
CUMBERLAND COUNTY POWER & LIGHT COMPANY,
PUBLIC UTILITIES COMMISSION OF THE STATE OF MAINE,

Respondents.

PETITION FOR RECONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE.

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IN THE

Supreme Court of the United States

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now your petitioners, Auburn Savings Bank, Eastport Savings Bank, and Skowhegan Savings Bank, and respectfully pray that this Court reconsider its order of October 10, 1949, denying their petition for a writ of certiorari to the Supreme Judicial Court of Maine.

The facts are as stated in the original petition; no intervening change in the facts has occurred. Petitioners desire,

however, to urge additional grounds for granting the writ, which were not contained in the original petition.

The essence of the situation before the Securities and Exchange Commission was that it was approving a proposal of the Power Company to be submitted as an offer to the Railroad Company. The offer presupposed acceptance by the Railroad Company before it could become a plan. It was submitted to the stockholders of the Railroad Company where 49% of the stock was owned by the Power Company, which had a vital interest adverse to the other stockholders. The acceptance came from this stockholders' meeting, at which the Power Company having such a vital adverse interest exercised its controlling vote in breach of the fiduciary relationship existing toward minority interests. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483 (1919); *Farmers Loan and Trust Company* v. *New York and Northern Railway Company*, 150 N. Y. 410 (1896). The trial court, whose findings of fact must be accepted on appeal, found that such a breach of fiduciary relationship had occurred (R. 515-A).

Because of the complete domination of the Railroad Company by the Power Company, the Commission recognized that special protection for the rights of what were in effect the minority stockholders of the Railroad Company was required. Consequently it provided that

> "• • • whether or not any security holder should vote in favor of the plan or choose to exercise his rights under the appraisal statute or by other means should be determined by his independent judgment."

Had it not been for the provision of the Commission's report quoted above, the very act of the Commission in approving the offer would have raised questions that would have necessitated review by the Court of Appeals.

However, such a review was not required for the protection of stockholders under the terms of the Commission's report, inasmuch as the essence of the Commission's action contemplated that in recognition of the unusual factors present, the minority stockholders should have the protection of resort to the state courts, if they saw fit, for adjudication of their rights.

Relying thereon, petitioners promptly instituted action in the courts of Maine in order to seek the protection to which, as minority stockholders, they were entitled and which the plan specifically provided.

In the meantime, certain other minority stockholders, plaintiffs below but not here petitioners, had instituted review in the Court of Appeals. However, before proceeding with the action in the state court by these petitioners and such other plaintiffs, Chief Justice Sturgis, the sitting justice, required that that appeal be withdrawn. At the outset of the hearing counsel for the respondents raised the question as to whether the appeal had been withdrawn (R. 2) and the following colloquy occurred between the sitting justice, Mr. Pierce, counsel for respondents, and Mr. Chesley, counsel for plaintiffs, including petitioners (R. 2-4):

> "Mr. Pierce: Your Honor, I have understood that the appeal taken from the order of the SEC was to have been dismissed before this proceeding started. I called the clerk this morning, to see that there was no miscarriage, and she says the appeal has not been dismissed.
>
> "The Court: What do you say to that, Brother Chesley?
>
> "Mr. Chesley: It has not been actually of record, if your Honor please. The Clerk has been informed that the appeal is dismissed and the proper motion will be filed later.

"The Court: You told me it was going to be filed somewhere around the 31st of May.

"Mr. Chesley: I did, your Honor, and I notified the Clerk that the appeal was dismissed so far as the parties plaintiff were concerned and asked him what the proper procedure was, and he said the proper procedure would be in due course for either party, either the SEC or the plaintiffs, to file a motion to that effect. The court is not in session now.

"The Court: When will it be in session again?

"Mr. Chesley: I think in October. If your Honor wants me to, I can prepare a motion and send it up to them, but I didn't think it was necessary inasmuch as I have written to the Clerk.

"The Court: It is rather necessary to keep your agreement, and the condition of this assignment was that that should be dismissed.

"Mr. Chesley: I will state, if your Honor please, so far as we are concerned, we have advised the Clerk that it was dismissed. The formal entry has not been made in the form of a motion.

"The Court: I think you should file something in writing, at least in this cause, waiving any right to continue your appeal, and make it formal. This Court is not going to proceed, as I advised you in chambers some time ago, with a possibility that after we have progressed to a certain stage some action will be taken in the court of appeals which will nullify all that we have done or make it a waste of effort and time.

"Mr. Chesley: In compliance with your Honor's suggestion, it may be stated for the record that the case of Maurice A. Bowers and Theron A. Woodsum, a petition for review brought in the Circuit Court of Appeals for the First Circuit in connection with the order of the SEC, under date as of December 19, 1944, is dismissed and no further proceedings will be taken thereon."

Petitioners then proceeded with the state court action in accordance with the Commission's report and in accordance with an essential term of the plan. However, respondents then claimed that the Maine courts lacked jurisdiction. This contention was denied by the sitting justice but upheld by the Supreme Judicial Court of Maine.

As a result of this decision which is claimed to be erroneous, petitioners are left without any means whatever of protecting their rights as minority stockholders, contrary to explicit provision of the Commission's report which recognized the necessity for such special protection.

Moreover, the Commission did not purport to bind any dissenting stockholder by virtue of action taken pursuant to Section 11(e) of the Holding Company Act, which provides:

> "If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18 of this chapter, to enforce and carry out the terms and provisions of such plan."

No application for enforcement as provided therein was contemplated or taken. On the contrary, as the sitting justice concluded (R. 505 A):

> "As I construe the law, this was a directive to Central Maine to present the Plan, with Offer included, which had been approved, to Portland Railroad Company and its stockholders and obedience by Central Maine was mandatory. Not so as to the Railroad Company or its stockholders. With them acceptance of the Offer and Plan was clearly optional

> and rights of all dissenting stockholders were preserved. • • •
>
> "If the Securities and Exchange Commission had the power to fix and determine the rights or remedies of stockholders of the Railroad Company who rejected the Plan which, to say the least, is doubtful, the Commission here expressly reserved to such stockholders their full and unfettered rights without limitation or restriction and did not attempt to exercise such a power."

Consequently, if the report of the Commission in fact constituted a plan, the action of the Supreme Judicial Court resulted in eliminating one of its integral parts. For, as already shown, the right to resort to state courts was necessary to the protection of minority rights. By its decision, the Supreme Judicial Court has eliminated this essential aspect of the plan and if this action is permitted to stand, the Commission's plan has indeed failed, since it is no longer the plan promulgated by it.

Unless remedied by this Court, as was done in *Schwabacher* v. *United States*, 334 U. S. 182 (1948), the inevitable result would be that legislation designed to protect investors is in fact used by a public utility to advance its own interests at the expense of investors.

WHEREFORE, your petitioners pray that the Court reconsider their petition that a writ of certiorari may issue out of and under the seal of this Court, directed to the Supreme Judicial Court of the State of Maine, commanding that court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings in said court in this case to the end that this cause may be reviewed and determined by this Court and that the order of said Supreme Judicial

Court of Maine be reversed and that your petitioners be granted such other and further relief as may appear proper.

Dated: October 24, 1949.

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Certificate of Counsel.

I hereby certify that the foregoing petition is presented in good faith and not for delay, and that it is restricted to substantial grounds not previously presented to this court.

WILLARD P. SCOTT.

OPPOSITION

BRIEF

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In the Supreme Court of The United States

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CUMBERLAND COUNTY POWER & LIGHT COMPANY
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Respondents

BRIEF FOR PORTLAND RAILROAD COMPANY, CENTRAL MAINE POWER COMPANY AND CUMBERLAND COUNTY POWER & LIGHT COMPANY, RESPONDENTS, IN OPPOSITION TO PETITION FOR RECONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI.

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If we correctly interpret the reason for reconsideration advanced by Petitioners, it is that the Petitioners were misled because the Respondents first insisted that a petition to the Circuit Court of Appeals for review under 24(a) of the Holding Company Act, which Petitioners' counsel had brought for two stockholders who were also intervenors in the State Court, be dismissed before beginning hearings on the bill in equity and, only after that petition for review had been dismissed, did Respondents for the first time claim that the State Court lacked jurisdiction to grant the relief sought by such bill in equity.

In answer, Respondents submit:

The real issue in this litigation is not whether the Sitting Justice or the Maine Supreme Court acted irregularly or oppressively or whether the Petitioners misconceived their rights or remedies but whether the Maine Court had jurisdiction to grant the relief sought; whether the Maine Supreme Court was correct in ruling that:

> "It could enter no decree which would be inconsistent with such action as was taken or might be taken by the Commission in the exercise of the exclusive jurisdiction given to it by the Holding Company Act." (R. 2277)

Contentions as to the details of procedure in the State Court proceeding are of no importance. Neither this Court nor the Maine Supreme Court can remand this bill in equity to the Commission. Nor is the right of appraisal provided by the Plan here in issue. The Petitioners declined to utilize it and the Maine Supreme Court declined to pass upon its validity. (R. 2276)

The Maine Court, having no jurisdiction to set aside action pursuant in all respects to an 11(e) Plan approved by the Commission as necessary to effectuate the provisions of subsection (b) and fair and equitable to all persons affected thereby, properly dismissed Petitioners' bill in equity. This Court properly denied their petition for certiorari and the pending petition for reconsideration should be likewise denied.

In no way abandoning our fundamental contention that the Maine Court lacks jurisdiction, Respondents further submit:

Petitioners' counsel was not coerced by the Sitting Justice into dismissing the petition for review under 24(a) which he had filed for the intervenors with the Circuit Court of Appeals.

The colloquy quoted in the petition for reconsideration occurred at the opening of the hearing before the Sitting Justice on June 25, 1945. It is clear from the statements of the Sitting Justice in the Record (quoted in the pending petition) that there had been a previous discussion in Chambers as to an assignment for hearing and that he had declined to make such assignment while there remained—

> "a possibility that after we have progressed to a certain stage some action will be taken in the Court of Appeals which will nullify all that we have done or make it a waste of effort and time."

Dismissal of the petition for review was not a condition to keeping the bill in equity alive on the docket of the Maine Court but, as the Sitting Justice stated, merely "the condition of this assignment" for hearing. He was not forcing counsel for the Petitioners into the dilemma of dismissing either the 24(a) petition or the bill in equity but merely stating that he would not start on a long hearing which, at any time during its progress or even after his decision, might become "a waste of effort and time" because of a decision of the Circuit Court of Appeals.

Petitioners' counsel made no objection and no reasonable objection was open. If he wished to prosecute the petition for review, the bill in equity would merely remain on the State Court docket until a decision by the Circuit Court of Appeals, whereupon the State Court proceeding could be set down for hearing; the legal situation being presumably clarified by the decision of the Circuit Court of Appeals.

The action of the Sitting Justice was merely the normal discretionary control of the calendar of his own Court and conservation of his own time. By no possibility could it present a federal question, important or otherwise, and constitute either a reason for certiorari required by Rule 38, par. 5(a) or "other substantial grounds" available to Petitioners required for reconsideration by Rule 33, par. 2. Certainly the facts of the case at bar bear not the slightest resemblance to those in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, cited in Rule 33 as a typical instance of "substantial grounds".

Parenthetically, we might suggest that the concurrent pendency of a petition for review in the Circuit Court of Appeals and a bill in equity in the Maine Court, plus the obvious chance of differing factual decisions by the two Courts, affords a typical illustration of the absurd results which would follow a system of dual jurisdiction. If on petition for review, the Circuit Court of Appeals confirmed the Order of the Commission approving the Plan, it is unthinkable that a State Court could set aside transactions consummated in strict accordance with its terms; nevertheless a Plan approved by the Commission, review of which is not sought, is exactly as binding upon utilities subject to the Commission as the identical Plan if, on review, it is found proper by a Court of Appeals.

Before Petitioners' counsel caused the 24(a) petition for review to be dismissed, he was fully informed of the Respondents' contention that the State Court lacked jurisdiction of the issues raised by the bill in equity.

On the date of the colloquy in question, June 25, 1945, no motion to dismiss the 24(a) proceeding had been filed. On that same day and immediately after the opening statement by Petitioners' attorney, the attorney for Respond-

ents, Central Maine Power Company and Cumberland County Power & Light Company, made his opening statement (R. Vol. III, p. 66); inserted in Record by the Printer at close of testimony presented by the Petitioners (R. Vol. V, pp. 1049-1 to 1049-13). That statement made clear his contention:—that the Commission's order was binding on all stockholders of the Railroad Company and not subject to attack in the State Court equity proceedings which should therefore be dismissed for lack of jurisdiction. (See R. Vol. V, pp. 1049-8 to 1049-13).

On June 26, the day following Respondents opening statement which thus definitely apprised both the Court and counsel for the Petitioners of Respondents' contention, counsel for the Petitioners mailed to the Circuit Court of Appeals a motion that the petition for review under 24(a) be dismissed and on the following day, June 27, notified the Court that that had been done. (See R. Vol. III, p. 169.) It is thus clearly apparent that the dismissal of the petition for review under 24(a) was due neither to coercion by the Sitting Justice nor to lack of knowledge by Petitioners' counsel of the Respondents' contention that the State Court lacked jurisdiction; but to the voluntary choice by Petitioners' counsel not to prosecute the petition for review in the Circuit Court of Appeals exactly as the Petitioners had chosen not to pursue their appraisal rights under the Maine statute.

This contention, of being either coerced or misled, was not made by Petitioners in the Court below and therefore is not available to them as a reason for certiorari or for reconsideration.

See *McCullough* v. *Kammerer Corporation,* 323 U. S. 327, discussed at pp. 7-8 of Respondents' Brief in opposition to the petition for certiorari.

The intervening plaintiffs, who had brought the petition for review under 24(a) and who, it is alleged, were induced to dismiss it, are not parties to the petition for certiorari, nor to the petition for reconsideration.

The present Petitioners did not petition for a review of the Commission's order by the Circuit Court of Appeals and the statutory period for filing such petition had expired long before the colloquy quoted; *the Petitioners, therefore, were not deprived of the right to seek such review by any action of the Respondents or of the Sitting Justice.*

Finding by Sitting Justice as to breach of fiduciary relationship is based solely on his factual conclusion as to value. Such issue is within exclusive jurisdiction of the Securities and Exchange Commission.

Petitioners state that the Sitting Justice made a Finding that the Respondents committed a breach of fiduciary relationship. That Finding, however, makes perfectly clear that its sole basis was the factual conclusion of the Sitting Justice that the fair value of the stock of the Railroad Company was $119.25 per share rather than the $110 which the Commission found "fair and equitable". (R. p. 587-A) It repeatedly states that there was no fraud, concealment, lack of proper notice of the stockholders' meeting, etc. (R. p. 501-A)

The Maine Supreme Court approved his findings as to legality of the meeting etc. and said: (R. p. 2266)

"The charges of fraud are without substance."

* * * * *

"And these same banks which are now plaintiffs were represented at that hearing (before the Commission) by Theron A. Woodsum, a statistician and security analyst employed by the Savings Bank Association of Maine. He said not one word about fraud. Not only have the plaintiffs failed to offer any direct evidence

> of the fraud which they have charged, but their silence when they should have spoken casts grave doubt on whether they ever had such evidence. To be sure, the briefs of counsel are filled as is the bill of complaint with charges of fraud. These are iterated and reiterated. But the vehemence with which an allegation is asserted is not a substitute for proof of it."

In disagreeing with the Commission as to what constituted "fair and equitable" treatment of the stockholders of the Railroad Company, the Sitting Justice first ruled as a matter of law that the Maine Court had jurisdiction to make the final decision as to a matter clearly within that "area of expert discretion" which this Court has held the *Holding Company Act expressly entrusted to the Commission.* (*Securities and Exchange Commission* v. *Central Illinois Securities Corporation, et al.*, decided June 27, 1949, 93 L. Ed. (adv. op.) 1291).

Thus, the basic issue of jurisdiction again appears. If the Maine Court and not the Commission had jurisdiction, the Maine Court might have jurisdiction to find that the proposed payment of $110 instead of $119.25 per share constituted a breach of fiduciary obligation. Since however it is the Commission and not the Maine Court which has exclusive jurisdiction to determine what was "fair and equitable" to the minority stockholders, any ruling of the Sitting Justice as to fiduciary obligation, based entirely on his finding that what the Commission found "fair and equitable" was in fact unfair, is likewise beyond his jurisdiction. The decision of the Maine Court of last resort so holding is therefore correct and the Petition for Reconsideration should be denied.

WHEREFORE, the undersigned Respondents pray this Honorable Court that the Petition for Reconsideration of Petition for Writ of Certiorari be denied.

Respectfully submitted,

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